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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

THE COMMITTEE TO OPPOSE THE SALE OF ST. BARTHOLOMEW'S CHURCH INCORPORATED, J. SINCLAIR ARMSTRONG, ROBERT E. MORRIS, JR., DORIS CAPP STASS, GEORGE H. WEILER, III, MADELEINE CALDER, BEATRICE LOTZ, BROMWELL AULT, JR., NEAL GOLDMAN and CHARLOTTE PIERCE ARMSTRONG,

Petitioners,

against

THE RECTOR, WARDENS and MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH, and THE CITY OF NEW YORK and THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(5527—LC2-562)

QUESTIONS PRESENTED FOR REVIEW

I. In Deciding Whether A Landmarks Law As Applied To A Church By A Municipal Landmarks Commission Violates The Church's Free Exercise Of Religion Or Constitutes A Taking Of Its Property Without Compensation, Must A Federal Court, In Fulfilling Its Obligation To Exercise Its Independent Judgment, Determine The Factual Issues At A Trial De Novo And Not Upon A Non-Judicial Administrative Record?

II. Was It An Abuse Of Discretion And An Abdication Of Federal Judicial Power For The District Court To Try The Case Upon The Non-judicial Administrative Record And To Deny Intervention To Petitioners Who Sought To Intervene On The Side Of The Municipality In Order To Compel A Trial De Novo Of The Constitutional Issues?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED vi

OPINIONS BELOW viii

JURISDICTION OF THE COURT viii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT

POINT I BY TRYING THIS CASE ON THE BASIS OF A NON-JUDICIAL ADMINISTRATIVE RECORD AND BY REFUSING TO CONDUCT A TRIAL DE NOVO, THE DISTRICT COURT ABDICATED ITS RESPONSIBILITY TO EXERCISE IT'S INDEPENDENT JUDGMENT TO ADJUDICATE THE CONSTITUTIONAL ISSUES UPON A JUDICIAL RECORD 14

POINT II THE DECISION OF THE DISTRICT COURT, AFFIRMED BY THE COURT OF APPEALS, TO TRY THE CONSTITUTIONAL ISSUES UPON THE NON-JUDICIAL RECORD IS CONTRARY TO NEW YORK CASE LAW REQUIRING TRIAL DE NOVO OF CONSTITUTIONAL CHALLENGES TO THE LANDMARKS LAW, AS ENUNCIATED BY THE HIGHEST COURTS IN NEW YORK AND IN PENN CENTRAL V. CITY OF NEW YORK DECIDED BY THIS COURT . . . 24

POINT III THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PETITIONERS INTERVENTION ON THE CLEARLY ERRONEOUS GROUNDS THAT IT COULD NOT CONDUCT A TRIAL DE NOVO BECAUSE IT WAS REQUIRED TO TRY THE CASE ON THE NON-JUDICIAL ADMINISTRATIVE RECORD 38

CONCLUSION 40

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit (September 12, 1990) 1a

Opinion and Order of the United States District Court for the Southern District of New York (December 13, 1989) 1b

Amended Opinion and Order of the United State District Court for the Southern District of New York (January 24, 1990) 1c

TABLE OF AUTHORITIES

CASES	Page
Crowell v. Benson 285 U.S. 22 (1932).	18-20
Ethical Culture v. Spatt, 51 N.Y.2d 449 (1980)	25, 27-28
Lutheran Church in America v. City of New York, 35 N.Y.2d 121 (1974)	25, 26-27, 29
Ng Fung Ho v. White 259 U.S. 276 (1922)	18
Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920)	18
Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).	28, 31-37
Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376 (1st Dep't 1968).	25
University of Tennessee v. Elliot, 478 U.S. 788 (1986).	15
United States v. Klein, 80 U.S. 128 (1871).	17

Page

Statutes

New York Administrative Code, Sections 25-301 to 25-321 (1986) 5

Other Authorities

Monaghan, Constitutional Fact Review, 85 Columbia Law Review 229 (1985) 21

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. AMEND. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

U.S. CONST. AMEND. V:

. . . . nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV:

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. ARTICLE III, SECTION 1:

The judicial power of the United States, shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.

FEDERAL RULE OF CIVIL PROCEDURE 24(b):

Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the

main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is set forth in the appendix at 1a.

The opinion of the United States District Court, Southern District of New York is reported at 728 F.Supp. 958 (SDNY 1989) and is set forth in the appendix at 1b and 1c.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on September 12, 1990. (1a)

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Preliminary Statement

This case involves the questions of (a) whether the application of a New York landmarks statute to St. Bartholomew's Church ("the Church")* constitutes an infringement of the Church's free exercise of religion or a taking of its property without compensation and (b) whether those factual determinations can be made by a federal court on the basis of a non-judicial landmark commission record?

After concluding that it was compelled to try the case on the non-judicial record of proceedings conducted before a municipal landmark commission, and not at a trial de novo, the District Court ruled that,

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*The Church's full corporate name is The Rector, Wardens and Members of the Vestry of St. Bartholomew's Church.

on the basis of that record, the plaintiff Church had failed to establish that the landmark regulation prevented it from conducting its charitable activities or religious mission in its existing facilities. The Church's free exercise and takings claims were, therefore, rejected. The Court of Appeals for the Second Circuit affirmed the ruling on the merits as well as the District Court's decision denying the instant petitioners the right to intervene on the side of the municipal defendants.

Petitioners, members of the Church and a committee* which they formed, unsuccessfully urged in the District Court that the Church's constitutional claims, involving sharp issues of fact and credibility, must be

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*The Committee to Oppose the Sale of St. Bartholomew's Church Incorporated has no parent or subsidiary corporations.

decided upon a trial de novo and not upon the non-judicial landmark commission record. Petitioners contended that only a full judicial hearing of all of the factual issues would suffice as a basis for constitutional determinations, especially ones of such far reaching import to the future of landmark preservation in New York as well as in the Nation. Although initially the District Court proceeded towards a trial de novo, it subsequently reversed its position and decided that it was required to try the case based solely upon the landmark commission record, as the Church and the municipality wanted to do. The District Court, for that reason, denied intervention to petitioners who had sought to intervene on the side of the municipality to compel a trial de novo. The case was then tried upon the non-judicial record by the District Court, which ruled against the

Church. The Court of Appeals affirmed.

The Church now petitions for a writ of certiorari as do the instant petitioners.

Petitioners submit that on the basis of the record employed, the decisions of the District Court and the Court of Appeals were correct and the Church's petition for certiorari should be denied. For even with the broad latituted of a non-judicial record, the Church was unable to prove that the landmark restriction was an unconstitutional burden upon it. The over-whelming weight of the "evidence" in that record demonstrated that the landmark restriction did not prevent this wealthy, well-endowed Park Avenue Church from practicing its religion or conducting its activities in its landmarked buildings, which buildings it is well able to maintain. The decision below should, therefore, be left undisturbed. In the event, however, that the

Church's petition for certiorari is granted, the petitioners request that this petition for certiorari also be granted so that this Court can, if it disagrees with the decision below, remand the case for a trial de novo.

Prior Proceedings

St. Bartholomew's Church is located on Park Avenue between 50th and 51st Street in Manhattan. In 1967 its two buildings and entire site were, without opposition, designated landmarks under New York City's landmarks law. (Now codified at New York City Administrative Code Sections 25-301 to 25-321 (1986).

Sixteen years after its landmark designation, the Church sought to capitalize on the increasing value of it Park Avenue real estate by attempting to commercially develop its property. In 1983, it filed the first of

three applications with the Landmarks Preservation Commission of the City of New York ("the Commission") for permission to replace one of its landmarked buildings with a fifty-nine story commercial office tower (later scaled down to forty-seven stories).

The Church urged, in public hearings before the Commission, that it could no longer carry on its activities within the constraints of its Community House building. It also urged that the cost of maintaining its landmarked buildings was more than it could afford -- notwithstanding an endowment of about $14.3 million, annual revenues of $3 million and the expenditure of more than $1.6 million of its contributed funds on its real estate development project. (25a, 28b, 30b)

The Commission, after conducting a series of public hearings (which, in the words of the District Court, were "more akin to town

meetings than judicial proceedings" (13b)) rejected the Church's claims that its existing buildings were inadequate for its purposes and were a hardship to maintain.

The Church's District Court action against the City of New York followed, with claims that the landmark designation constituted an interference with its free exercise of religion and a taking of its property without just compensation.

At the outset of the case in the District Court, petitioners, who had opposed the Church's development efforts in the parish, in the New York State courts and at the public hearings before the Commission, sought to intervene on the side of defendants, the City of New York and the Commission. Petitioners urged that the Church's claims of alleged hardship were untrue, were a pretext designed solely to enable the Church to

commercially develop its real estate to its highest value and that the factual issues underlying the Church's constitutional claims should be subjected to the full rigors of an adversarial judicial proceeding.

At the outset of the action, the District Court allowed petitioners "to intervene as amicus curiae." In the District Court's words it "allowed [petitioners] to intervene as amicus curiae" because "there are enormous factual disputes about the nature of the claims of financial hardship and the credibility thereof". In the "interest in seeing to it that I get a full record" petitioners were "allowed . . . to intervene as amicus curiae". (District Court Transcript, November 20, 1987, page 131).

As the District Court added: "I had a feeling that I would not get all the facts I needed to resolve this issue intelligently

from the parties that brought the case, I ought to let someone else give this to me, either as amicus curiae or as intervenors." (District Court Transcript, November 20, 1987, pages 27-28)

When the parties advised the Court that they wanted to try the case on the basis of the Commission record, the District Court stated:

> What you are saying that because the parties agreed that this is what we want to do to save the cost, time and expense and get the thing done quickly, someone else out there, who has relevant facts to provide to the Court that would undercut the merits of your claim, should not be let in to tell the Court what the true facts are, because you have made a business decision that you don't want to bother with that. That is why I reconsidered my decision on the intervention question. I had a feeling that I would not get all the facts I needed to resolve this issue intelligently from the parties. That being the case, I ought to let someone else give them to me, either as amicus curiae or as intervenors."

(District Court Transcript of November 20, 1987 pages 27-28)

"If the claim is that - which I think is the claim - we can make no use of this property for charitable purposes and therefore the statute unconstitutionally impinges upon our right to fulfill our charitable mission, that is a fact question and I denied the motion for summary judgment. I am not satisfied that, based upon the papers I have seen already, in which there are enormous factual disputes about the nature of the claims of financial hardship and the credibility thereof, I can resolve that question on that record unless everybody wants to. There are people in this case who don't want to and who have an interest in seeing to it that I get a full record, which is why I allowed you to intervene as amicus curiae. I could let you stay as amicus curiae and participate in a trial if I chose to do that. But I was not satisfied, once the situation changed, that you were being adequately represented by the State of New York, because they may not have had the same interest you have. That is why I scheduled this conference."

(District Court Transcript of November 20, 1987, page 131)

Although initially the District Court "was of the view that it could have a trial de novo . . . in deciding whether the landmark

laws had been unconstitutionally applied to [the Church]," it subsequently "reconsidered this view and concluded," over petitioners' objections, that it was required to try the case based solely upon the non-judicial Commission record. (12b)

The trial in the District Court was thus held based on the Commission's record which, in the District Court's own words, was not "quasi-judicial in nature" and which was "more akin to town meetings than judicial proceedings, in that all may be heard regardless of the relevance of their testimony, evidentiary rules do not apply, and questioning by the attorneys for the interested parties is not allowed." (13b) In so ruling, the District Court denied petitioners' renewed motion to intervene in order to force a trial de novo.

Upon the Commission's record, the

District Court ruled that the Church had not established that the landmark regulation prevented it from carrying out its religious and charitable mission in its existing buildings and, therefore, had not proven its free exercise or takings claims. The Church appealed.

Petitioners also appealed the denial of their attempt to intervene to compel a trial de novo and urged in the Court of Appeals (as they do before this Court) that the judgment against the Church should be permitted to stand, but, if reversed, the case should be remanded for a trial de novo.

The Second Circuit affirmed the judgment of the District Court against the Church, as well as the District Court's denial of intervention.

The Church now petitions for certiorari. Petitioners oppose the granting

of that petition, and urge, as they did in the courts below, that, even with the broad latitude afforded to the Church in the Commission proceedings (unfettered by the rules of evidence and without being subjected to cross-examination and discovery), the Church's factual claims were so demonstrably flawed and so incredible of belief that the District Court and the Court of Appeals were fully justified in rejecting its claims.

However, in the event that this Court grants certiorari to the Church, this petition should also be granted so that this Court can, in the event of a reversal, remand the case for a trial de novo.

The myriad of conflicting factual issues to be determined before ruling upon the Church's serious claims of constitutional infringements should, in the event of a reversal, be decided on a full judicial record.

Constitutional justice and the public interest require nothing less.

Petitioners desire to pursue this petition for certiorari only if the Church's petition for certiorari is granted.

REASONS FOR GRANTING THE WRIT

POINT I

BY TRYING THIS CASE ON THE BASIS OF A NON-JUDICIAL ADMINISTRATIVE RECORD AND BY REFUSING TO CONDUCT A TRIAL DE NOVO, THE DISTRICT COURT ABDICATED ITS RESPONSIBILITY TO EXERCISE IT'S INDEPENDENT JUDGMENT TO ADJUDICATE THE CONSTITUTIONAL ISSUES UPON A JUDICIAL RECORD

In deciding the constitutional claims before it, the District Court ruled that the landmark proceedings were not quasi-judicial and, therefore, the prior Commission adjudications of issues of fact were not preclusive and binding upon the Court. It, therefore, rejected the defendants' contention that under

University of Tennessee v. Elliot, 478 U.S 788 (1986) preclusive effect must be given to the Commission's factual findings. The District Court thus recognized that the landmark proceedings were "more akin to town meetings than judicial proceedings, in that all may be heard regardless of the relevance of their testimony, evidentiary rules do no apply and questioning by the attorneys for the interested parties is not permitted." (13b).

Having thus ruled that the Commission record was not sufficiently judicial to be given preclusive effect, the District Court inexplicably employed that very same record as the basis for its rulings on the constitutional issues before it. In so doing, it refused to permit a trial de novo of the Church's First and Fifth Amendments claims, as petitioners urged. Instead, it made its constitutional findings of fact and conclusions

upon the non-judicial Commission record. It thereby abdicated its duty to reach an independent judgment on the constitutional issues raised, upon independent findings of fact made on a judicial record. Nothing less should have been required on its constitutional rulings of far-reaching public importance to both the preservation and religious communities in New York and throughout the country.

When, as here, issues of facts are significant to constitutional outcomes, federal courts must act to insure the development of a proper and adequate judicial record upon which to render their independent findings.

Since Marbury v. Madison, federal courts have understood themselves to have the power and the responsibility to fully and fairly adjudicate constitutional claims in

cases otherwise properly before them. This Court consistently has been hostile to circumstances in which constitutional matters are properly before federal courts but in which those courts are fettered in their capacity to reach independent judgments as to the appropriate constitutional outcome. This hostility often is expressed in terms of the independence of the federal judiciary as secured by Article III of the Constitution. See e.g. United States v. Klein, 80 U.S. 128 (1871).

When constitutional issues arise in cases properly lodged in the federal judiciary, the independence of the federal judiciary and its place in the constitutional scheme of government gives rise to a special mandate for independent judgment, one which carries with it a special concern for judicial determinations of constitutional facts.

Crowell v. Benson, 285 U.S. 22 (1932) (which held that courts, in the exercise of their independent judgment, must determine constitutional facts upon an independent record); Ng Fung Ho v. White 259 U.S. 276 (1922), (independent judgment required constitutional fact review in context of adjudicative action by an administrative agency) Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920) (independent judgment required constitutional fact review where an agency performed legislative function).

In Crowell v. Benson, 285 U.S.22 (1932), the Court recognized that constitutional facts must be found by the Courts:

> In relation to these basic [constitutional] facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in

> relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions... [To permit conclusive administrative determinations of matters of constitutional fact] would be to sap the judicial power as it exists under the Federal Constitution ... wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

Crowell v. Benson, 285 U.S. 22, 56-57 (1932).

While it does not inevitably follow from the requirement that a federal court make independent findings of constitutional fact that it always generate its own independent record, the authority and responsibility of federal courts to determine facts necessarily requires such a record in cases such as this which do not otherwise have a prior judicial record.

Since no judicial or quasi-judicial

record was made in this case before the Commission, the rationale and holding of Crowell v. Benson, requiring an independent federal judicial record on matters of constitutional fact, is most relevant:

> Upon what record is the determination [by a federal court of matters of constitutional fact] to be made? .... We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

285 U.S. at 63-64.

In the instant case, where there does not exist a formal quasi-judicial administrative record, under Crowell v. Benson, an independent federal record should have been required.

One distinguished commentator has noted that "an independent record is only an

adjunct to the more basic requirement of independent judicial judgment" and, therefore, "this procedural safeguard is unnecessary where there is a trial type administrative proceeding resulting in a formal record." Monaghan, Constitutional Fact Review, 85 Columbia Law Review 229, 225 (1985). Since the proceedings before New York's Landmark Commission were not "trial-type" and did not result in a "formal record", the District Court in this case was required to develop an independent record in order to render an independent judgment.

In this case, constitutional justice could only have been assured by a de novo hearing on the pertinent constitutional facts, since there was no formal record, in the judicial sense, previously created before the Commission. The procedural posture of the Commission with regard to the Church's various

applications did not permit the making of a formal adversary record or of a record safeguarded by the rules of evidence. The proceedings were not in the normal sense adversarial and were, to a large degree, one-sided. The Church was given a full, fair and most liberal opportunity to present its case, unfettered by the rules of evidence or cross-examination. The Commission considered whether a case had been made out for granting an exemption from the landmarks law, concluded that it had not, and so ruled. No government advocate appeared to cross-examine the Church's witnesses, to attack the credibility of the Church's claims and to present a case against the Church's applications. No attention was given to adducing evidence to rebut the evidence introduced on the Church's behalf. In sum, the Commission's function was not to make a record. The Commission per-

formed its function, however, by concluding, as it was easily able to do on the basis of the Church's own showing, that the case for hardship relief from the landmarks law had not been made out.

Once the District Court concluded that the Commission proceedings were not quasi-judicial and undertook to rule on the issues of fact pertinent to the Church's constitutional as applied claims, a fully adversarial trial de novo was required. For only upon such a judicial record can a federal court exercise its independent judgment in ruling upon the constitutional issues before it.

Both the District Court and the Court of Appeals ignored the responsibility of federal courts to develop an independent judicial record and to make constitutional rulings upon such a record. They also ignored all of

the New York State Court cases (discussed in Point II below) which, in passing upon identical constitutional claims under New York's landmarks law presented by other not-for-profit and for-profit corporations, have fully recognized the courts' responsibility to develop an independent judicial record beyond the administrative "town hall" proceedings conducted by the Commission.

POINT II

THE DECISION OF THE DISTRICT COURT, AFFIRMED BY THE COURT OF APPEALS, TO TRY THE CONSTITUTIONAL ISSUES UPON THE NON-JUDICIAL ADMINISTRATIVE RECORD IS CONTRARY TO NEW YORK CASE LAW REQUIRING A TRIAL DE NOVO OF CONSTITUTIONAL CHALLENGES TO THE LANDMARKS LAW, AS ENUNCIATED BY THE HIGHEST COURTS OF NEW YORK AND IN PENN CENTRAL V. CITY OF NEW YORK, DECIDED BY THIS COURT

In New York, constitutional challenges to the application of the landmarks law are

always decided upon a trial de novo.

The law relating to constitutional challenges to New York's landmarks law by not-for-profit entities is set forth in three leading New York appellate court decisions. Two of the decisions, decided by the Court of Appeals, New York's highest Court, are Matter of Society for Ethical Culture v. Spatt, 51 N.Y.2d 449 (1980) and Lutheran Church in America v. City of New York, 35 N.Y.2d 121 (1974). A third decision, Matter of Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376 (1st Dep't 1968), decided by an intermediate appellate court, was cited with approval by the Court of Appeals in the Ethical Culture and Lutheran Church cases.

In all three of the foregoing New York cases, de novo trials and hearings were conducted in order to determine whether the alleged hardship imposed by the Commission's

landmark designation constituted an unconstitutional taking.

In the Lutheran Church case, a hearing was required in order to resolve the issue of whether the landmark designation constituted so material an interference with the property owners ability to use its property as to physicially or financially "prevent, or seriously interfere with the carrying out of the charitable purpose." (Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 131 (1974)). At the judicial hearing which was held, plaintiff presented evidence relating "to the nature of its work, its space requirement, the inadequacies of the existing space, its plans to rebuild and the impact of the designation on all of this." Lutheran Church at p. 126. Plaintiff also proved, "that the use to which the property has been put for over 20 years

would have to cease because of the inability under the designation to replace the building." Lutheran Church at p. 129. Based upon this judicial record, and not upon the Commission proceedings, the New York Court of Appeals concluded that "the existing building is totally inadequate for plaintiff's legitimate needs." Lutheran Church at p. 132.

In Ethical Culture v. Spatt, 51 N.Y.2d 449 (1980), the New York Court of Appeals applied the principles enunciated in Lutheran Church and ruled that the impact of the landmark designation upon the plaintiff religious organization was not unconstitutionally confiscatory or an interference with the free exercise of its religious activities. The Court's conclusion was based, not upon the public hearings before the Commission, but upon a non-jury trial conducted in the plaintiff's declaratory judgment action.

Based "on this record" the court concluded that "the landmark designation withstood constitutional scrutiny". Ethical Culture v. Spatt, 51 N.Y.2d 449, 455 (1980).

In deciding the factual issues necessary to make its constitutional determinations, the New York trial courts conducted formal trials or hearings in the Lutheran Church, Ethical Culture and Sailor's Snug Harbor cases, all involving not-for-profit corporations, as well as in Penn Central Transportation Co. v. City of New York (42 N.Y.2d 324, 397 N.Y.S. 2d 914, affd, 438 U.S. 104 (1978), involving a for-profit corporation. None of the courts relied upon the Commissions non-judicial record in ruling upon the disputed factual issues necessary to their constitutional determinations. The reason is obvious. "Landmark designations are clearly administrative and not quasi-judicial in

nature . . . The public hearing provided for in the Landmarks Law is not the sort of adversary hearing involving cross-examination and the making of a record. . . ." Lutheran Church In America v. City of New York, 35 N.Y.2d 121, 128 (1974).

It is for those very reasons that the New York Courts conduct a trial before passing upon the issue of whether the New York landmarks law, as applied to a plaintiff, constitutes an unconstitutional taking.

In one such case, which was ultimately decided by this court, Penn Central Transportation Co. v. City of New York 438 U.S. 104 (1978), plaintiff, a New York City real property owner, sued for a declaratory judgment declaring that New York's landmarks law, as applied to it, was so burdensome as to constitute a taking of property.

In Penn Central, as here, suit was brought after the Commission had denied the plaintiff property owner permission to alter its landmarked building to develop its property to its highest commercial value. Unlike here, however, the public hearings held before the Commission in Penn Central did not become the record upon which the New York court tried the case and upon which this Court rested its rulings upon the constitutional issues raised. Rather, Penn Central was required, in the trial court, to prove that its constitutional rights had been violated. A lengthy trial, of some 13 days, was held. Based upon that full judicial record (and not upon the public hearings at the Commission) the Court of Appeals of New York concluded that Penn Central had failed to prove that the landmark designation constituted a taking of its property without compensation.

In affirming that decision, this Court reviewed New York law concerning the availability of hardship relief from the New York landmarks law for both not-for-profit and for-profit corporations. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). In this Court's discussion of Section 207-8.0 (a)(2) of the New York statute and the New York case law, it recognized the inherent power of courts to set aside any landmark designation which amounts to an unconstitutional taking of property without compensation. After describing the statutory scheme of Section 207-8.0 governing hardship relief for owners of taxable property, the Penn Central Court made the following observations about the two avenues of relief available to owners of tax-exempt property, first discussing the statutory remedy available before the Commission and

then discussing the relief available from the courts (438 U.S. at 113):

> "Tax-exempt structures are treated somewhat differently. They become eligible for special treatment only if four preconditions are satisfied: (1) the owner previously entered into an agreement to sell the parcel that was contingent upon the issuance of a certificate of approval; (2) the property, as it exists at the time of the request, is not capable of earning a reasonable return; (3) the structure is no longer suitable to its past or present purposes; and (4) the prospective buyer intends to alter the landmark structure. In the event the owner demonstrates that the property in its present state is not earning a reasonable return, the Commission must either find another buyer for it or allow the sale and construction to proceed.
>
> "But this is not the only remedy available for owners of tax-exempt landmarks. As the case at bar illustrates . . . , if an owner [of taxable property] files suit, and establishes that he is incapable of earning a 'reasonable return' on the site in its present state, he can be afforded judicial relief. Similarly, where a landmark owner who enjoys a tax exemption has demonstrated that the landmark structure, as restricted, is totally inadequate for the

> owner's 'legitimate needs', the law has been held invalid as applied to that parcel. See Lutheran Church v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305 (1974)."

This Court's analysis thus recognized that under New York law, two avenues of hardship relief are available to owners of landmarked tax-exempt property: (a) they can obtain hardship relief from the Commission if the "four preconditions" set out in Section 207-8.0(a)(2) of the statute "are satisfied"; and (b) they can obtain relief from a court if they can prove in a court of law that the landmark designation constitutes a taking of their property without compensation.

Should an owner of tax-exempt property be able to convince the Commission of the existence of the "four preconditions" enumerated in the New York statute, it would be granted relief in the administrative

proceeding. But, as this Court stated in Penn Central, that "is not the only remedy available." If an owner of tax-exempt property "files suit" and proves in a court of law "that the landmark structure, as restricted, is totally inadequate for the owner's 'legitimate needs', the law has been held invalid as applied to that parcel". Penn Central v. City of New York, 438 U.S. 104, 113 (1978).

In the Penn Central case, a judicial decision upon the constitutional claims was properly based, not upon the non-judicial Commission proceedings, but rather upon a trial de novo.

In the instant case, over the objections of petitioners, the case was tried based solely upon the Commission record. The District Court, ignoring the New York cases as well as Penn Central, and ignoring its duties

under Article III, erroneously ruled that it was required to try the case on the non-judicial record before the Commission and the Court of Appeals for the Second Circuit affirmed.

By refusing to require a trial de novo, the District Court permitted the Church to shield from close scrutiny its statements and claims of alleged hardship in maintaining its landmarked property, the credibility of which are central to the case. It permitted the Church to make the very same presentation and claims which it had made to the Commission, without being subject to the rules of evidence or discovery, without having its witnesses subjected to cross-examination, and without a formal adversary proceeding.

Thus, neither at the Commission nor in the District Court has there been a judicial proceeding to resolve the credibility of

the Church's fundamental claims (a) that the landmark restrictions infringe upon its freedom of religion and (b) that the "landmark structure, as restricted, is totally inadequate for the owner's 'legitimate needs'." (Penn Central v City of New York).

Based upon the Commission record which it employed, the District Court concluded (and the Court of Appeals affirmed) that the Church had not carried its burden of proof to justify relief from its landmark designation. Petitioners concur with the conclusions reached by the courts below, based upon the record employed. At the very least, the Church, which insisted upon trying the case on that record, should be bound by its decision. For even upon an administrative record in which the Church was given the widest latitudes, unfettered by the rules of evidence and the rules of discovery, it was still unable to

carry its burden of proof. For what clearly emerged, even from this record, was the picture of a prosperous Park Avenue Church with an endowment of over $14 million and annual revenues of over $3 million, full well able to live within and maintain its landmarked structures. Its claims of hardship were nothing more than a pretext to develop its Park Avenue property to its highest value. In sum, on a record most favorable to it, and accepting many of the alleged "facts" presented by the Church at face value, the Church still failed to establish that the landmark structure was, in the words of this Court, "totally inadequate for the owner's 'legitimate needs'." (Penn Central v. City of New York).

Should this Court however disagree with the District Court's conclusions made on the record employed, the case should be

remanded for a trial de novo, as mandated by the New York precedents as well as by Article III of the Constitution.

POINT III

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PETITIONERS INTERVENTION ON THE CLEARLY ERRONEOUS GROUNDS THAT IT COULD NOT CONDUCT A TRIAL DE NOVO BECAUSE IT WAS REQUIRED TO TRY THE CASE ON THE NON-JUDICIAL ADMINISTRATIVE RECORD

The District Court denied petitioners' motion for permissive intervention under Federal Rule 24(b) after it concluded that it would be "inappropriate" to have a trial de novo and that it was required to try the case upon the Commission record. (12b) "[I]ntervention would have seriously interfered with the parties desire to expeditiously resolve the constitutional claims raised on the administrative record, and might well have led

to collaterilzation of the issues and further discovery." (7b)

The Court of Appeals affirmed that ruling on the grounds that intervention "only would complicate the litigation, and thereby 'unduly delay . . . the adjudication of the rights of the original parties'. Fed. R. Civ. P. 24(b)" (28a)

Thus permissive intervention was denied because the intervenors wanted that which was required: a trial de novo of the constitutional issues. Both the District Court and the Court of Appeals refused to recognize the clear obligation of a federal court to try constitutional issues upon a judicial record as well as the New York cases requiring a trial de novo. Instead, upon the erroneous conclusion that it was required to try the case based on the administrative record, as well as in the interests of

accommodating the desires of the parties to reach an expeditious resolution of the constitutional claims, the District Court abused it discretion, abdicated its responsibilities as on Article III court, ignored New York case law and improperly rendered its decision upon the non-judicial administrative record.

In the event of a reversal, the petitioners' motion to intervene should be granted and the case should be remanded for a trial de novo.

CONCLUSION

For the reasons stated, it is respectfully requested that, in the event the Court grants the petition for certiorari of the Church, this petition for a writ of certiorari should also be granted.

Respectfully submitted,

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Dated: New York, New York
December 5, 1990

APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1431, 1432—August Term, 1989

(Argued: July 17, 1990 Decided: September 12, 1990)

Docket Nos. 88-7751, 90-7101

THE RECTOR, WARDENS, AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Plaintiff-Appellee (Re: 88-7751),
Plaintiff-Appellant (Re: 90-7101),

—v.—

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Defendants-Appellees (Re: 88-7751, 90-7101),

THE COMMITTEE TO OPPOSE THE SALE OF ST. BARTHOLOMEW'S CHURCH INCORPORATED, J. SINCLAIR ARMSTRONG, ROBERT E. MORRIS, JR., DORIS CAPP STASS, GEORGE H. WEILER, III, MADELINE CALDER, BEATRICE LOTZ, BROMWELL AULT, JR., NEAL GOLDMAN, AND CHARLOTTE PIERCE ARMSTRONG,

Appellants (Re: 88-7751).

Before:

WINTER and WALKER, *Circuit Judges*,
and MUKASEY,* *District Judge*.

Appeal from a judgment of the United States District Court for the Southern District of New York (John E. Sprizzo, *Judge*), entered after a bench trial, ruling that the New York City Landmarks Law did not violate plaintiff-appellant Church's First Amendment right to the free exercise of religion or its Fifth Amendment right against government takings of property without just compensation. We affirm.

DOUGLAS M. PARKER, New York, New York (Judah Gribetz, Howard W. Goldstein, George A. Pierce, Mudge Rose Guthrie Alexander & Ferdon, Henry P. Monaghan, Kent Greenawalt, James G. Glazebrook, New York, New York, of counsel), *for Plaintiff-Appellee (Re: 88-7751), Plaintiff-Appellant (Re: 90-7101)*.

ELIZABETH DVORKIN, New York, New York (Victor A. Kovner, Corporation Counsel of the City of New York, Leonard Koerner, Jonathan L. Pines, Dorothy

* Hon. Michael B. Mukasey, United States District Judge for the Southern District of New York, sitting by designation.

Miner, New York, New York, of counsel), *for Defendants-Appellees (Re: 88-7751 and 90-7101).*

GERALD D. FISCHER, New York, New York, *for Appellants (Re: 88-7751), Amici Curiae Committee to Oppose the Sale of St. Bartholomew's Church Inc., J. Sinclair Armstrong, Robert E. Morris, Jr., Doris Capp Stass, George H. Weiler, III, Madeleine Calder, Beatrice Lotz, Bromwell Ault, Jr., Neal Goldman and Charlotte Pierce Armstrong (Re: 90-7101).*

Donald G. Glascoff, Jr., Robert Knuts, Cadwalader, Wickersham & Taft, New York, New York, *for Amici Curiae New York State Interfaith Commission on Landmarking of Religious Property, Council of Churches of the City of New York, Inc., Queens Federation of Churches, New York State Council of Churches, National Council of Churches of Christ in the U.S.A., National Association of Evangelicals, Baptist Joint Committee on Public Affairs, Evangelical Lutheran Church in America, New York Board of Rabbis, Department of Church in Society, Division of Homeland Ministries, Christian Church (Disciples of Christ), and Americans United*

for the Separation of Church and State (Re: 90-7101).

Lee Boothby, Boothby, Ziprick & Yingst, Berrien Springs, Michigan, *for Amicus Curiae Council on Religious Freedom (Re: 90-7101).*

George J. McCormack, Cusak & Stiles, New York, New York, Kevin M. Kearney, Hurley, Kearney & Lane, Brooklyn, New York, *for Amici Curiae Roman Catholic Archdiocese of New York, Roman Catholic Diocese of Brooklyn, and New York State Catholic Conference (Re: 90-7101).*

Frank Patton, Jr., Ellis, Stringfellow & Patton, New York, New York, *for Amicus Curiae Church of St. Paul and St. Andrew (Re: 90-7101).*

John J. Kerr, Jr., Elizabeth P. Johnson, Nancy B. Mallery, Simpson Thacher & Bartlett, New York, New York, *for Amici Curiae National Trust for Historic Preservation, National Center for Preservation Law, New York Landmarks Conservancy, Preservation Action, Fine Arts Federation, Preservation League of New York State, and Women's City Club of New York, Inc. (Re: 90-7101).*

William E. Hegarty, Howard G. Sloane, Cahill, Gordon & Reindel, New York,

New York, *for Amicus Curiae Municipal Art Society of New York, Inc. (Re: 90-7101).*

WINTER, *Circuit Judge*:

This appeal poses the question of whether a church may be prevented by New York City's Landmarks Law, now codified at New York City Administrative Code Sections 25-301 to 25-321 (1986), from replacing a church-owned building with an office tower. The question implicates both First and Fifth Amendment issues. Specifically, the Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church ("the Church") appeal from Judge Sprizzo's decision that the New York City Landmarks Law, as applied to an auxiliary structure next to the Church's main house of worship, did not impose an unconstitutional burden on the free exercise of religion or effect a taking of property without just compensation.

The district court grounded its decision on its finding that the Church had failed to prove that the landmark regulation prevented the Church from carrying out its religious and charitable mission in its current buildings. We agree that this is the legal standard established by Supreme Court precedent governing both free exercise and takings claims. Moreover, we find no clear error in the district court's factual determinations. We therefore affirm. We also affirm the denial of a motion to intervene by a group of persons opposed to the Church's plans to develop its property.

BACKGROUND

St. Bartholomew's Church is a Protestant Episcopal Church organized in 1835 under the laws of the State of New York as a not-for-profit religious corporation. The main house of worship ("the Church building") stands on the east side of Park Avenue, between 50th and 51st Streets, in New York City. Constructed beginning in 1917 according to the plans of architect Bertram G. Goodhue, the Church building is a notable example of a Venetian adaptation of the Byzantine style, built on a Latin cross plan. Significant features include its polychromatic stone exterior, soaring octagonal dome, and large rose window. Perhaps most significantly, Goodhue incorporated into his building the Romanesque porch of St. Bartholomew's former Church building at Madison Avenue and 44th Street. Designed by the renowned architectural firm of McKim, Mead & White, the porch is composed of a high arched central portal flanked by two lower arched doorways, all supported by slender columns. The doors themselves are richly decorated bronze, depicting Biblical themes.

Adjacent to the Church building, at the northeast corner of Park Avenue and 50th Street, is a terraced, seven-story building known as the Community House. It is the replacement of this building with an office tower that is at issue in the instant matter. Completed in 1928 by associates of Goodhue, the Community House complements the Church building in scale, materials and decoration. Together with the Church building, the Community House houses a variety of social and religious activities in which the Church is engaged. It contains a sixty-student preschool, a large theater, athletic

facilities (including a pool, gymnasium, squash court, and weight and locker rooms), as well as several meeting rooms and offices for fellowship and counseling programs. A community ministry program, which provides food, clothing, and shelter to indigent persons, is operated mainly from the Church building. Meals are prepared in a small pantry on the first floor and served in the mortuary chapel. Ten homeless persons are housed nightly in the narthex.

In 1967, finding that "St. Bartholomew's Church and Community House have a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City," the Landmarks Preservation Commission of the City of New York (the "Commission") designated both buildings as "landmarks" pursuant to the Landmarks Law. This designation prohibits the alteration or demolition of the buildings without approval by the Commission. *See* N.Y.C. Admin. Code § 25-305(a)(1) (1985).

The Church did not object to the landmarking of its property. In December 1983, pursuant to what is now New York City Administrative Code Section 25-307, the Church applied to the Commission for a "certificate of appropriateness" permitting it to replace the Community House with a fifty-nine story office tower. This request was denied as an inappropriate alteration. In December 1984, the Church filed a second application, scaling down the proposed tower to forty-seven stories. This application was also denied.

The Church thereafter filed a third application under a different procedure. Pursuant to Sections 207-4.0 and

207-8.0 of the New York City Administrative Code,[1] commonly known as the "hardship exception," it sought a certificate of appropriateness for the forty-seven story tower on the ground of the Community House's present inadequacy for church purposes. The Church's application was the subject of a series of public hearings before the Commission in late 1985 and early 1986. At those hearings, the Commission gathered evidence from various interested parties, including expert testimony and written reports regarding the adequacy of the Community House for the Church's charitable programs, the necessity and cost of structural and mechanical repairs for the Church building and Community House, and the Church's financial condition. Following the public hearings, the Commission convened in Executive Session, open to the public, on several occasions in February 1986. At these meetings the Commission discussed the Church's application, accepted further submissions from interested parties, and took testimony and reports from its own *pro bono* experts. On February 24, the Commission voted to deny the application because the Church had failed to prove the necessary hardship. Several months later the Commission issued a lengthy written determination detailing the reasons for its denial.

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1 Now found at Section 25-309, the provision states that a certificate of appropriateness shall be granted to a not-for-profit applicant who shows, *inter alia*, that such

> improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is not [sic] longer engaged in pursuing such purposes.

N.Y.C. Admin. Code § 25-309(a)(2)(c) (1985).

On April 8, 1986, the Church brought the instant action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983. The complaint set forth a host of constitutional claims. It alleged that the Landmarks Law, facially and as applied to the Church, violates both the free exercise and establishment clauses of the First Amendment by excessively burdening the practice of religion and entangling the government in religious affairs. It also alleged that the Landmarks Law violates the equal protection and due process clauses of the Fourteenth Amendment because it applies different standards to charitable and commercial institutions respectively and constitutes a taking of property without just compensation. In addition, the Church alleged a variety of procedural due process violations and brought a pendent state law claim alleging that the Church should have been granted a certificate of appropriateness under New York law.

The Church moved for partial summary judgment on its claims of facial unconstitutionality. Defendants cross-moved for summary judgment on all claims. The district court granted summary judgment to defendants with respect to the issues of facial unconstitutionality only. On the First Amendment claims, the court ruled that the Landmarks Law "creates no more than an incidental burden on the practice of religion" and that entanglement doctrine was not applicable. On the equal protection claim, the court ruled that the different hardship tests applied to charitable and commercial organizations were rational. Finally, it held that the notice and hearing provisions of the Landmarks Law comport with constitutional standards of due process.

The district court then held a bench trial with respect to the claims that the Landmarks Law is unconstitutional as applied to the Church. The parties agreed that the evidentiary record before the district court would be limited to the evidence presented to the Commission, contained in a twenty-three volume appendix. In considering the Church's takings claim, the court adopted the standard articulated by New York State courts: An unconstitutional taking exists "where the landmark designation [of property owned by a charitable organization] would prevent or seriously interfere with the carrying out of the charitable purpose of the institution." *St. Bartholomew's Church v. City of New York*, No. 86 Civ. 2848 (JES), slip op. at 17-18 (S.D.N.Y. Dec. 13, 1989) (opinion and order) (citing *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974)). The district court applied the same test to the claim of an unconstitutional burden on religion. It thus stated, "[I]n this case, the First Amendment inquiry is identical in scope to the Fifth Amendment inquiry, since to prevail on either claim plaintiff must prove that it can no longer carry out its religious mission in its existing facilities." *Id.* at 18.

The district court then examined the record before the Commission in order to determine whether the Church had proved by a preponderance of the evidence that it can no longer carry out its charitable purpose in its existing facilities. The district court found that it had not, for three basic reasons. First, it ruled that the Church had failed to demonstrate that the Community House is insufficient to accommodate the various pro-

grams currently based there. Second, it found that the Church had exaggerated the cost of the necessary repairs to the structural and mechanical systems of the Church building and Community House. Third, the court held that the Church had failed to prove that it cannot afford to make the necessary repairs and renovations to its buildings. Having concluded that the Church had not carried its burden of demonstrating that the Landmarks Law precludes it from continuing its activities in its existing facilities, the district court rejected the Church's First and Fifth Amendment claims and entered judgment for defendants.[2]

On appeal, the Church renews its free exercise and takings claims and argues that the district court's factual findings were clearly erroneous.

In the course of proceedings, the district court denied a motion to intervene on the side of defendants made by several individual parishioners and the Committee to Oppose the Sale of St. Bartholomew's Church Incorporated, a group of St. Bartholomew's members and others opposed to commercial development of the Church's property. It held that the proposed intervenors had no ownership interest in the property at issue and that their participation would interfere with the efficient administration of the litigation. *See St. Bartholomew's Church v. City of New York*, No. 86 Civ. 2848 (JES), slip op. (S.D.N.Y. Oct. 27, 1986) (order denying motion to intervene). A year later, after the parties agreed that the trial in the instant action should be conducted solely on the record before the Commission, the proposed interve-

2 The district court treated the Church's remaining procedural due process and state law claims as abandoned, because the Church had disavowed any interest in having a new hearing before the Commission, the only relief available to remedy these claims.

nors renewed their motion, which was again denied. *See St. Bartholomew's Church v. City of New York*, No. 86 Civ. 2848 (JES), slip op. (S.D.N.Y. Apr. 6, 1988) (order denying motion to intervene). The proposed intervenors appeal from this ruling.

DISCUSSION

Sections 1 and 2 of this portion of the opinion reject the Church's free exercise and takings claims. Our discussion assumes the affirmance of the district court's factual findings as detailed in section 3.

1. *The Free Exercise Claim*

The Church argues that the Landmarks Law substantially burdens religion in violation of the First Amendment as applied to the states through the Fourteenth Amendment. In particular, the Church contends that by denying its application to erect a commercial office tower on its property, the City of New York and the Landmarks Commission (collectively, "the City") have impaired the Church's ability to carry on and expand the ministerial and charitable activities that are central to its religious mission. It argues that the Community House is no longer a sufficient facility for its activities, and that the Church's financial base has eroded. The construction of an office tower similar to those that now surround St. Bartholomew's in midtown Manhattan, the Church asserts, is a means to provide better space for some of the Church's programs and income to support and expand its various ministerial and community activities. The Church thus argues that even if the proposed office tower will not house all of the Church's programs, the revenue generated by renting commercial

office space will enable the Church to move some of its programs—such as sheltering the homeless—off-site. The Church concludes that the Landmarks Law unconstitutionally denies it the opportunity to exploit this means of carrying out its religious mission. Although the Landmarks Law substantially limits the options of the Church to raise revenue for purposes of expanding religious charitable activities, we believe the Church's claims are precluded by Supreme Court precedent.

As the Court recently stated in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), the free exercise clause prohibits above all " 'governmental regulation of religious *beliefs* as such.' " *Id.* at 1599 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) and citing cases). No one seriously contends that the Landmarks Law interferes with substantive religious views. However, apart from impinging on religious beliefs, governmental regulation may affect conduct or behavior associated with those beliefs. Supreme Court decisions indicate that while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers. For example, in *Smith* the Court held that the free exercise clause did not prohibit the State of Oregon from applying its drug laws to the religious use of peyote. *See* 110 S. Ct. 1595. *Cf. United States v. Lee*, 455 U.S. 252 (1982).

The synthesis of this caselaw has been stated as follows: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his reli-

gion prescribes (or proscribes).' " *Smith*, 110 S. Ct. at 1600 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring)). The critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented. *See id.* at 1599.

The Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions. It thus applies to "[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value." N.Y.C. Admin. Code § 25-302(n) (1986).

It is true that the Landmarks Law affects many religious buildings. The Church thus asserts that of the six hundred landmarked sites, over fifteen percent are religious properties and over five percent are Episcopal churches. Nevertheless, we do not understand those facts to demonstrate a lack of neutrality or general applicability. Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria—having "special character or special historical or aesthetic interest or value"—set forth by the Landmarks Law. N.Y.C. Admin. Code § 25-302(n) (1986). This, however, is not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.

The Church's brief cites commentators, including a former chair of the Commission, who are highly critical of the Landmarks Law on grounds that it accords great discretion to the Commission and that persons who have

interests other than the preservation of historic sites or aesthetic structures may influence Commission decisions.[3] Nevertheless, absent proof of the discriminatory exercise of discretion, there is no constitutional relevance to these observations. Zoning similarly regulates land use but it is hardly a process in which the exercise of discretion is constrained by scientific principles or unaffected by selfish or political interests, yet it passes constitutional muster. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

The Church argues that landmarking and zoning differ in that landmarking targets only individual parcels while zoning affects larger segments. However, the Landmarks Law permits the designation of historic districts, *see* N.Y.C. Admin. Code § 2503(4) (1986), while all zoning laws provide for variances for individual sites. Even if the two forms of regulation bear the different characteristics asserted by the Church, those differences are of no consequence in light of *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978). There, the Court stated:

> [L]andmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law

3 The Landmarks Law made a cameo appearance in a recent best-selling novel as a vehicle for political retaliation against a clerical official seeking to develop Church property. *See* T. Wolfe, *Bonfire of the Vanities* 569 (1987) ("Mort? You know that church, St. Timothy's? . . . Right . . . LANDMARK THE SON OF A BITCH!").

> embodies a comprehensive plan to preserve structures of historic or aesthetic interest whenever they might be found in the city . . . .

Id. at 132 (citation omitted).

It is obvious that the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs. In this particular case, the revenues involved are very large because the Community House is on land that would be extremely valuable if put to commercial uses. Nevertheless, we understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause. *See Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990); *Hernandez v. Commissioner*, 109 S. Ct. 2136 (1989). The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices. In *Lyng v. Northwest Cemetery Protective Ass'n*, 108 S. Ct. 1319, 1326 (1988), the Court explained,

> It is true that . . . indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment . . . . This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.

> The crucial word in the constitutional text is "prohibit" . . .

We agree with the district court that no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities. *Cf. Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 872 (2d Cir. 1988).

In sum, the Landmarks Law is a valid, neutral regulation of general applicability, and as explained below, we agree with the district court that the Church has failed to prove that it cannot continue its religious practice in its existing facilities.[4]

2. *The Takings Claim*

The Church also claims that the Landmarks Law so severely restricts its ability to use its property that it constitutes confiscation of property without just compensation in violation of the Fifth and Fourteenth

4 The Church also argues that the Landmarks Law involves an excessive degree of entanglement between church and state in violation of the establishment clause. The district court dismissed this argument as irrelevant in the present context, reasoning that the entanglement doctrine applies only to instances of government funding of religious organizations. However, in *Jimmy Swaggart Ministries* the Supreme Court considered an entanglement claim in the context of government taxation of the sale of religious materials by a religious organization. The Court found no constitutional violation, as the regulation imposed only routine administrative and recordkeeping obligations, involved no continuing surveillance of the organization, and did not inquire into the religious doctrine or motives of the organization. *See* 110 S. Ct. at 697-99. These same factors are of course largely true of the Landmarks Law. The only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural. This degree of interaction does not rise to the level of unconstitutional entanglement.

Amendments.[5] However, the Supreme Court's decision in *Penn Central* compels us to hold otherwise.

In *Penn Central*, the Supreme Court held that the application of New York City's Landmarks Law to Grand Central Terminal did not effect an unconstitutional taking. *See* 438 U.S. at 138. That famous beaux arts style train station, located in midtown Manhattan (just eight blocks from St. Bartholomew's Church) was designated a landmark in 1967. *See id.* at 115-16. Shortly thereafter, Penn Central Transportation Company ("Penn Central"), principal owner of the Terminal, in order to increase its income, sought to build a high-rise office tower atop the Terminal. The Landmarks Commission, however, denied the proposal because " '[q]uite simply, the tower would overwhelm the Terminal by its sheer mass.' " *Id.* at 118 (quoting the record on appeal). The Supreme Court squarely rejected Penn Central's claim that the building restriction had unconstitutionally "taken" its property. Central to the Court's holding were the facts that the regulation did not interfere with the historical use of the property and that that use continued to be economically viable:

> [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office

5 The Fifth Amendment provides in part, "nor shall private property be taken for public use, without just compensation," U.S. Const. amend. V, and is applicable to the states through the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

> space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Id. at 136.

Applying the *Penn Central* standard to property used for charitable purposes, the constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use. We conclude that the Landmarks Law does not effect an unconstitutional taking because the Church can continue its existing charitable and religious activities in its current facilities. Although the regulation may "freeze" the Church's property in its existing use and prevent the Church from expanding or altering its activities, *Penn Central* explicitly permits this. In that case, the Landmarks Law diminished the opportunity for Penn Central to earn what might have been substantial amounts by preventing it from building a skyscraper atop the Terminal. Here it prevents a similar development by the Church—one that, in contrast to the proposal to build an office tower over Grand Central Terminal, would involve the razing of a landmarked building—at least so long as the Church is able to continue its present activities in the existing buildings. In both cases, the deprivation of commercial value is palpable, but as we understand *Penn Central*, it does not constitute a taking so long as continued use for present activities is viable.

The Church offers several arguments to distinguish *Penn Central*, but we find them unavailing. First, it

argues that while Penn Central stipulated that it was able to earn a "reasonable return" on the Terminal even under the regulation, *see* 438 U.S. at 129, in this case, the use of the Community House for commercial purposes would yield an estimated return of only six percent. Even if true, this fact is irrelevant. "Reasonable return" analysis was appropriate to determine the viability of the existing commercial use of the Terminal but has no bearing on the instant matter because the existing use of the Community House is for charitable rather than commercial purposes. So long as the Church can continue to use its property in the way that it has been using it—to house its charitable and religious activity—there is no unconstitutional taking.

Second, the Church notes that it presented a second proposal for a smaller building to the Commission, but Penn Central did not. This hardly makes any difference. Just as the Commission in *Penn Central* remained open to a building addition that " 'would harmonize in scale, material and character,' " 438 U.S. at 137 (quoting record on appeal), with the Terminal, it invited appellant to propose an addition to the Community House in the instant matter. Finally, we reject as unsupported appellant's argument that in *Penn Central* the property owner continued to enjoy valuable, transferrable rights to develop the airspace above the Terminal, *see* 438 U.S. at 137, while the Church's development rights have little value. *See* Section 3(a) *infra*.[6]

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6 Appellant urges further that application of the Landmarks Law to the Church does not substantially advance a legitimate state interest. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987). While land use restrictions must be reviewed in the context of the individual property in question, *see Nectow v. City of Cambridge*,

3. *Findings of the District Court*

The principal factual finding of the district court—one central to its rejection of the Church's free exercise and takings claims—was that the Church "failed to show by a preponderance of the evidence that it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities." *St. Bartholomew's Church v. City of New York*, No. 86 Civ. 2848 (JES), slip op. at 37 (S.D.N.Y. Dec. 13, 1989) (opinion and order).

The Church claims that the Community House is an inadequate facility in which to carry out the various activities that presently comprise the Church's religious mission and charitable purpose. It further claims that it cannot afford to make the needed repairs and renovations to the Community House and Church building. It concludes that it must be allowed to replace the Community House with a revenue-generating office tower. The district court was unconvinced. It found that the Church failed to prove that the Community House is fundamentally unsuitable for its current use and that the cost of repair and rehabilitation is beyond the financial means of the Church. Appellant argues on appeal that these findings were clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985); *Sygma Photo News, Inc. v. High Society Magazine*, 778 F.2d 89, 95-96 (2d Cir. 1985). We disagree.

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277 U.S. 183 (1928), the same government interest held to be valid in *Penn Central*—"preserving structures and areas with special historic, architectural or cultural significance," 438 U.S. at 129—is equally applicable here.

a. Adequacy of the Community House

The Church claims that the amount and configuration of usable space in the Community House is insufficient to accommodate the Church's various programs. It relies principally upon an analysis of space in the Community House by Walker Associates, an interior design firm hired by the Church. Presented to the Commission in three written reports and related oral testimony (collectively, "the Walker Report"), this study concluded that the demands for space by the Church's various programs exceeded the capacity of the Community House. Additionally, the Walker Report stated that renovation or expansion was impractical due to the structural inflexibility of the building.

The district court discredited the Walker Report. With regard to space, there is no dispute that the Community House currently is too small. The Walker Report found that 8000 square feet of extra space is needed. The Commission placed the deficiency at about 4500 square feet.[7]

Fatal, however, to the Church's claim is the absence of any showing that the space deficiency in the Community House cannot be remedied by a reconfiguration or expansion that is consistent with the purposes of the Landmarks Law. The Walker Report assumed that the Community House had an outmoded structure that precluded such an option. In fact, the building has a modern, light steel frame structure and was designed so that two additional floors could easily be added. Moreover,

7 The Walker Report determined that the total space required in the Community House is 41,500 square feet, as against 33,500 square feet of available useable space. The Commission accepted the figure for requirements, but estimated the available useable space at approximately 37,000 square feet.

the Commission has indicated that it would be receptive to a proposal from the Church for such an addition. While expanding the amount of available space in the Community House may not provide ideal facilities for the Church's expanded programs,[8] it does offer a means of continuing those programs in the existing building. Certainly the intermediate option of limited expansion must be thoroughly explored before jumping to replacement with a forty-seven story office building.

b. Cost of Repair and Rehabilitation

The Church also argues that the necessary repairs to the physically deteriorating Church building and Community House would be prohibitively expensive. It relies on a study of the mechanical systems and exteriors of those buildings prepared by O'Brien, Krietzburg and Associates, a construction management firm, and submitted to the Commission through written reports and oral testimony (collectively, "the OKA Report"). The OKA Report estimated that it would cost approximately $11 million over two years to bring the buildings' mechanical, electrical, and plumbing systems into proper working order and to repair the buildings' exteriors.

The district court also rejected this conclusion, faulting the OKA Report for being biased in favor of replacement over rehabilitation, ignoring actual conditions at the property site, and using an inappropriate method of estimating costs. Further, the district court pointed to contradictory evidence presented to the Commission, both by persons opposing the proposed development and by neutral consultants. Based on this information, the court found $3 million "phased in over

8 For instance, the existing building cannot readily accommodate the larger gymnasium or greater theater wing space sought by the Church.

a period of several years" to be a reasonable estimate for repairs and replacement.

On appeal, the Church does not seriously defend the $11 million estimate contained in the OKA Report. Instead, it accepts the $3 million estimate for the work that it covers, but argues that this figure disregards certain "major elements of cost." In particular, the Church asserts that an additional $500,000 is necessary for life safety measures, $647,000 for repair of the church organ, and $360,000 for architectural and engineering fees. The City counters that the life safety additions would unnecessarily exceed building code requirements, that organ repair is not a proper expense for this proceeding, and that design fees would be negligible.

We need not rule on this dispute over approximately $1.5 million because it is not crucial to the district court's operative factual finding. As our discussion in the next section indicates, even if the potential cost of repairs totaled $4.5 million, the Church has not adequately demonstrated that it is unable to meet this expense. Thus, the district court's central finding that the Church had failed to prove that it cannot continue in its existing facilities does not hinge on whether any portion of this $1.5 million was excluded from its estimate of repair costs.

c. The Church's Finances

As a corollary to its claim that repair and rehabilitation of the Church building and Community House would be too costly, the Church argues that its financial condition does not allow it to make the necessary improvements and also continue its other programs. The

district court, however, found that appellant had failed adequately to prove this assertion, a finding that is not clearly erroneous.

The Church has three primary sources of support and revenue: contributions in the form of pledges and offerings collected at worship services, income earned on investments, and fees charged for participation in activities conducted under its sponsorship. Investment income is derived from the Church's investment portfolio, known as the Consolidated Church Fund, the value of which stood at nearly $11 million at the end of 1984. The principal of this endowment consists of funds received as gifts or bequests. In addition, the Church's endowment includes a Properties Fund, representing resources in Church-owned property at acquired cost, net of depreciation, and a miscellaneous General Fund. Combined, these funds totalled just under $3.5 million at the end of 1984, giving the Church an overall endowment of about $14.3 million at that time. Over the decade preceding 1985, the Church's sources of revenue have sporadically kept pace with expenses, exceeding them in 1975, 1977, 1980, 1983 and 1984, and falling behind in 1976, 1978, 1979, 1981, and 1982. On the whole, the Church had only a slight net deficit over this period.

The Church's principal argument is that a major improvement expenditure of the type required to repair and renovate the Church building and Community House would severely damage this "precarious" balance of revenues and expenses. Because such an expenditure would come from endowment funds, the Church contends, future investment income will inevitably decline as the result of a depleted portfolio. Such a decrease in

future revenues, it concludes, will produce "severe deficits."

While a reduced principal will yield less investment income, the Church has not demonstrated that its budget cannot withstand building improvement expenditures under a reasonable financing procedure. For example, as the district court noted, withdrawals from the endowment might be made gradually to minimize lost investment income, or the Church might borrow against its endowment, and repay the loan over an extended period of time. Appellant has offered no financial projections or cash flow analyses to prove that these financing methods are not feasible. Without such data, the district court's finding that the Church failed to prove prospective financial hardship is not clearly erroneous.

We also cannot ignore the paucity of evidence offered by the Church to show that other forms of revenue are not available. Its claim that a capital fundraising drive already has been exhausted as a financing possibility is undercut by evidence that longtime members of the congregation cannot recall any such drive. Also, evidence before the Commission indicated that the transferrable development rights for the airspace above the Church property are, contrary to the Church's claim, not worthless.

Finally, the Church argues that even if its endowment could withstand a building project, it is not at liberty to withdraw large sums for that purpose because of legal restrictions on the use of its investment funds. In particular, it urges that Section 717 of the New York Not-For-Profit Corporation Law prohibits the Church from expending the sums necessary to undergo a building project. That provision, however, does no more than

impose upon the Church a fiduciary duty of care to manage the congregation's money in a prudent and responsible fashion, *see* N.Y. Not-for-Profit Corp. Law §§ 513, 717 (McKinney Supp. 1990), and would be implicated only if the expenditures in question would unacceptably impair the Church's financial condition.[9]

4. *The Motion to Intervene*

The proposed intervenors argue that the district court should have granted their motion to intervene on the side of the defendants at trial. We may reverse the denial of a motion to intervene only for "abuse of discretion." *See United States v. Hooker Chemical & Plastics*, 749 F.2d 968, 990 (2d Cir. 1984). No such abuse is present here. The district court properly denied intervention as of right under Fed. R. Civ. P. 24(a)(2) because the proposed intervenors lack any legally protectable interest in this matter. Under New York law, as a Protestant Episcopal Church, St. Bartholomew's is a corporate body placed in the trusteeship of its church wardens and vestrymen. *See* New York Religious Corporation Law § 41 (McKinney Supp. 1990). To the extent that the proposed intervenors are members of the parish, they enjoy only the right to vote in the election of the church wardens and vestrymen. *See id.* § 43. Thus, the Rector, Wardens and Members of the Vestry is the proper party to litigate the constitutionality of encumbrances placed on Church property.

9 Although the Church also points to Section 513 of the Not-for-Profit Corporation Law, which deals with the administration of assets received for specific purposes, *see* N.Y. Not-for-Profit Corp. Law § 513 (McKinney Supp. 1990), it concedes that donor-imposed restrictions are not a "principal constraint" preventing the improvement of its property. It does not challenge the district court's finding that enough of the Church's funds are unrestricted so as to allow it to undertake a building project.

Nor did the district court abuse its discretion by denying permissive intervention under Rule 24(b). It was eminently reasonable to conclude that intervention only would complicate the litigation, and thereby "unduly delay . . . the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

CONCLUSION

For the reasons stated above, we affirm both the judgment of the district court in favor of the defendants-appellees and the order of that court denying the motion to intervene.

APPENDIX B—Opinion and Order of the United States District Court, Southern District of New York.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE RECTOR, WARDENS, and MEMBERS OF THE VESTRY of ST. BARTHOLOMEW'S CHURCH,

Plaintiff,

against

CITY OF NEW YORK, and LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Defendants.

86 Civ. 2848 (JES)

APPEARANCES

Mudge, Rose, Guthrie, Alexander & Ferdon, Attorneys for Plaintiff, 180 Maiden Lane, New York, New York 10038; Douglas M. Parker, Esq., Judah Gribetz, Esq., Howard W. Goldstein, Esq., George A. Pierce, Esq., Of Counsel.

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Hurley, Kearney & Lane, Attorneys for Amici Curiae in Support of Plaintiff, 32 Court Street, Brooklyn, New York 11201; Kevin M. Kearney, Esq., Of Counsel.

Peter L. Zimroth, Corporation Counsel of the City of New York, Attorney for Defendants, 100 Church Street—Room 6-C-19, New York, New York 10007; Jonathan L. Pines, Esq., Lucy A. Cardwell, Esq., Assistant Corporation Counsels, Of Counsel.

Simpson, Thacher & Bartlett, Attorneys for Amici Curiae in Support of Defendants, 425 Lexington Avenue, New York, New York 10017; John J. Kerr, Jr., Esq., David W. Sussman, Esq., Elizabeth P. Johnson, Esq., Of Counsel.

Cahill Gordon & Reindel, Attorneys for Amici Curiae in Support of Defendants, 80 Pine Street, New York, New York 10005; William E. Hegarty, Esq., Howard G. Sloane, Esq., David F. Freedman, Esq., Of Counsel.

SPRIZZO, D.J.:

Plaintiff, the Rector, Wardens and Members of the Vestry of St. Bartholomew's Church bring this action pursuant to 42 U.S.C. § 1983, for declaratory and injunctive relief and for damages. Plaintiff contends that defendants, City of New York and the Landmarks Preservation Commission of the City of New York ("Commission"), have violated its rights under the First, Fifth and Fourteenth Amendments to the United States Constitution, and under the laws of the State of New York. The Court has, by agreement of the parties, held a bench trial on the evidence previously submitted to the Commission in 1985 and 1986. After reviewing that evidence *de novo* and considering the law applica-

ble thereto, the court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).[1]

BACKGROUND

St. Bartholomew's Church is a Protestant Episcopal Church organized under the laws of the State of New York as a non-profit religious corporation. The Church building, designed by Bertram Goodhue, was completed in 1919, and is located on the east side of Park Avenue between East 50th and East 51st Streets in the City of New York. *See* 8 App. 2540; 10 App. 3432. Next to the church building is a seven floor community house constructed by Goodhue's successor firm during the years 1926-28. *See* 8 App. 2540, 10 App. 3433; 11 App. 4062. The community house provides, in combination with the church building, a home for a variety of social and religious activities in which the Church is engaged.[2] In addition to the two structures, the Church's Park Avenue property is improved by a garden and terrace area. *See* 11 App. 4062.

In March of 1967, the church, the exterior of the community house and the surrounding property were designated as landmarks by the Commission, a designation plaintiff did not then oppose.[3] *See* 8 App. 2540. Subsequently, however,

[1]The parties have set forth the evidence submitted to the Commission in the form of a twenty-three volume appendix ("App."). References to that evidence in this Opinion are to the volume and page number of that appendix, *e.g.*, 1 App. 246 refers to appendix volume one at page 246.

[2]Among other things, the community house provides athletic facilities, including a pool and basketball court, a theatre, a pre-school for sixty students, meeting rooms, kitchen and dining facilities and office space. The church building, in conjunction with the community house, provides clothing, meals and sleeping quarters for the homeless. *See* 10 App. 3433-35.

[3]The Church's ability to alter or demolish the buildings is restricted by a landmark designation. Any such alteration requires the approval of the Commission. *See* N.Y. Admin. Code § 25-305(a)(1).

plaintiff filed two applications with the Commission seeking a Certificate of Appropriateness under what is now N.Y. City Admin. Code § 25-307.[4] The first such application, filed in December 1983, sought permission to tear down the community house and erect in its place a fifty-nine story office tower. *See* Affidavit of Gene Norman ("Norman Aff.") at ¶ 21. This application was denied as an inappropriate alteration on June 21, 1984. *See id.* at ¶ 25. The second application, filed in December 1984, sought to demolish the community house in favor of a forty-seven story office tower. *See id.* at ¶ 27; 8 App. 2470. This application was also denied as inappropriate on August 26, 1985. *See* Norman Aff. at ¶ 29. After the denial of plaintiff's second application, a further application to build the forty-seven story tower was made on September 3, 1985, on grounds of insufficient return pursuant to sections 207-4.0 and 207-8.0 of the New York City Administrative Code.[5] *See* 10 App. 3234.

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[4]Section 307(a) provides in relevant part: "the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter."

[5]Section 207-8.0(2)(c), now found at § 25-309(a)(2)(c), provides that a certificate of appropriateness on the ground of insufficient return shall be granted when the applicant shows, *inter alia*, that: "such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes."

In addition, New York law requires that a certificate of appropriateness be granted where failure to do so would "prevent or seriously interfere" with the applicant's ability to carry out its charitable purpose. *See Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925,434 N.Y.S.2d 932, 935 (1980); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974).

The Commission held public hearings on plaintiff's third application on October 29, 1985, December 3, 1985, and January 21, 1986. *See* 2 App. 321; 3 App. 704; 4 App. 1114. At those hearings the Commission heard testimony from all interested parties, including expert witnesses who testified regarding the suitability of the community house to its charitable purpose, the extent and cost of necessary structural and mechanical repairs for both the church and community house, and the state of the Church's finances. In addition, the Commission received many reports from the testifying experts and other submissions. After the close of the last public hearing, the Commission met in Executive Session, open to the public, on February 6, 11, 18, 20, and 24, 1986 to discuss plaintiff's application, to accept further submissions from interested parties, and to take testimony and reports from the Commission's own *pro bono* consultants. *See* 5 App. 1537, 1638; 6 App. 1803, 1914; 7 App. 2117. After considering all of the evidence submitted, the Commission voted on February 25, 1986, to deny plaintiff's application. *See* Norman Aff. at ¶ 67. On October 10, 1986, the Commission issued its written determination denying the application. *See id.* at ¶ 68; 19 App. 6448.

Thereafter, plaintiff brought the instant action alleging the following constitutional claims: 1) that the landmark laws are facially unconstitutional to the extent they impact the property of any church because they interfere with the free exercise of religion in violation of the First Amendment; 2) that the landmark laws are facially unconstitutional because they treat charitable and commercial institutions differently in violation of the equal protection clause of the Fourteenth Amendment; 3) that the landmark laws are unconstitutional as applied to St. Bartholomew's as a consequence of the Commission's denial of their applications for a certificate of appropriateness, because that denial interfered with the free exercise of religion and because the denials constitute a taking of property without

compensation; 4) that the landmark laws both facially and as applied to St. Bartholomew's violate the establishment clause by requiring an intrusive examination of the church's internal affairs in the hardship application process; 5) that the landmark laws both facially and as applied violate the doctrine of substantive due process by depriving the church of its property's reasonable income production without a compelling state interest; 6) that the legal standards for designation of a landmark and for granting a certificate of appropriateness are impermissibly vague in violation of the due process clause of the Fourteenth Amendment; 7) that the lack of cross-examination of witnesses in the certificate of appropriateness procedure, the vagueness of the commission's first two denial letters, the Commission's failure to consider economic hardship in the second application and the commission's failure to allow plaintiff to submit responses to the Commission's witnesses all constitute due process violations. In addition, plaintiff brought state law claims for Article 78 relief alleging that the Church should have been granted a certificate of appropriateness under New York law.[6]

Plaintiff then moved for partial summary judgment on its claims of facial unconstitutionality, and defendant cross-moved for summary judgment.[7] These motions were later supplemented to add the issue of whether plaintiff's Article 78 claims were justiciable in a federal forum. The Court

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[6]Plaintiff could have sought review of the Commission's factual and legal determinations in an Article 78 proceeding in New York State Supreme Court but elected not to do so. *See* N.Y. Civ. Prac. L. & R. § 7801 (McKinney 1981).

[7]In addition to moving for summary judgment on plaintiff's claims of facial unconstitutionality defendants asserted that plaintiff's as applied claims were insufficient as well because plaintiff still retained some viable economic use of its property.

ruled on these motions in open court. Those rulings are recapitulated below in section I.[8]

DISCUSSION

I. *Plaintiff's Claims of Facial Unconstitutionality*

A. *First Amendment Claims*

The Court rejects plaintiff's contention that the landmark laws unconstitutionally interfere with the free exercise of the religious beliefs of any church that is designated a landmark. The gravamen of plaintiff's free exercise claim is that by restricting a church's ability to use its property as it wishes in support of its religious or charitable mission, the landmark laws impermissibly burden the exercise of religious belief.

That claim lacks merit. A statute abridges the free exercise of religion when it coerces the affected individuals' into violating their religious beliefs or when "[it] penalize[s] religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n.*,

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[8]In addition to the summary judgment motions in this case, a motion to intervene on the side of the defendants was made by the Committee to Oppose the Sale of St. Bartholomew's, a group of church members opposed to the development project. The Court determined that intervention as of right was not appropriate because the members of the Committee had no ownership interest in the Church property itself, but at best only had the right to vote on the development issue in an intra-church proceeding. The Court also denied permissive intervention as a matter of discretion because, quite aside from the jurisdictional problems caused by such intervention, that intervention would have seriously interfered with the parties' desire to expeditiously resolve the constitutional claims raised on the administrative record, and might well have led to collateralization of the issues and further discovery. *See infra* Discussion at II. In addition, the Court was persuaded that affording *amicus curiae* status to the putative intervenors provided an adequate substitute for permissive intervention.

108 S. Ct. 1319, 1325 (1988); *see also Tony & Susan Alamo Found. v. Secretary of Labor,* 471 U.S. 290, 303 (1985); *Sherbert v. Verner,* 374 U.S. 398, 402 (1963). A substantial interference with the free exercise of religion may also occur where church property is taken, even by condemnation, for state purposes. *Cf. Yonkers Racing Corp. v. City of Yonkers,* 858 F.2d 855, 871 (2d Cir. 1988), *cert. denied,* 109 S. Ct. 1527 (1989).

However, the mere possibility that a church may at some time want to make a different use of its landmarked property creates no more than an incidental burden on the practice of religion that does not "require the state to come forward with a compelling reason justifying its actions." *See Yonkers, supra,* 858 F.2d at 871. Therefore, the designation of church buildings as landmarks does not in and of itself violate the free exercise clause.[9] This is especially true since the landmark designation does not deprive the Church of the right to seek a certificate of appropriateness to alter its property if the nature of that property is such that it no longer can be used to carry out its religious or charitable mission.

Plaintiff also contends that because the New York statutory and judicial tests for determining when a certificate of appropriateness may be granted on the grounds of hardship require an intrusive examination into the finances and internal workings of the Church, those tests, both on their face and as applied to St. Bartholomew's, result in an excessive entanglement between government and religion

[9]The Court also rejects plaintiff's contention that whenever a law has any impact upon a religious institution it must be justified by a compelling state interest. A compelling state interest is only required when the law impermissibly burdens the free exercise of religion. *See Yonkers, supra,* 858 F.2d at 871. Absent such a burden the state need only show a rational basis for the legislation. The New York landmark laws have such a rational basis. *See Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 129 (1978). Thus, plaintiff's substantive due process claims are without merit as well.

in violation of the establishment clause. While the establishment clause does prohibit excessive entanglement between government and religion, *see Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), that doctrine has normally been applied in factual situations in which state aid to religious institutions requires extensive and continuous monitoring of church activities to ensure that government financing is being used solely for secular purposes. *See id.; see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502-03 (1979). That doctrine has no applicability where, as here, the government must make an inquiry into church finances for the limited purpose of determining the validity of a church's claim of financial hardship.

B. *Equal Protection Claims*

Plaintiff alleges that because the landmark laws provide different hardship tests for commercial and charitable entities including religious institutions, they violate the equal protection clause. Because the Court has already found that the laws do not on their face impermissibly burden religion, any differences in treatment need only be justified by a rational basis.[10]

As a threshold matter it should be noted that the equal protection clause only protects persons who are similarly situated from disparate treatment. Therefore, the differences between commercial entities and charitable institutions render that argument dubious at best. In any event, those differences clearly provide the state with a rational basis for treating those entities differently.

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[10]Plaintiff also argues that its equal protection rights have been violated because the landmark laws treat landmarked and non-landmarked churches differently. This argument is at best an attack upon the general rationality of the landmark laws, an attack foreclosed by *Penn Central, supra.*

Since the hardship test for commercial enterprises is based upon the ability to earn a reasonable return from its property, it is obvious that a similar standard could not be applied to an entity which exists for charitable and not commercial purposes.[11] Indeed, it would make little sense, and might in fact be irrational, to apply the charitable test to a commercial property or the commercial test to a charitable property. It follows that the so called disparity in treatment is nothing more than a reasonable effort by the state to afford hardship relief to both classes of entities based upon criteria specifically tailored to the nature of each.

C. *Due Process Claims*

Plaintiff also argues that the legal standards for designating a landmark and for granting a certificate of appropriateness are impermissibly vague and give the Commission virtually unfettered discretion in making its decisions. Therefore plaintiff argues the laws do not comport with the minimum requirements of procedural due process.

At the very least, due process requires notice and an opportunity to be heard. *See Mathews v. Eldridge,* 424 U.S. 319, 332-33 (1976). The landmark laws unquestionably meet that standard in that they provide a property owner with adequate notice of the law's requirements and with the opportunity for an extensive hearing, especially in view of the interpretation placed upon those laws by the courts of New York. *See, e.g., Society for Ethical Culture,* 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935; *Lutheran Church in America,* 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16. It follows that since a

[11] N.Y. City Admin. Code § 207-8.0(a)(1)(a), now § 25-309(a)(1), permits commercial property to obtain a certificate of appropriateness on the ground of insufficient return if, *inter alia,* the land marked building "is not capable of earning a reasonable return."

reasonable person can and should know what standards must be met in bringing an application for a certificate of appropriateness or in opposing a landmark designation, those statutes are not unpermissibly vague. *See Maynard v. Cartwright,* 108 S. Ct. 1853, 1858 (1988).

While it is true that the procedures available at a landmark hearing are not the same as those available at a civil trial, that is not what due process requires. *See Mathews, supra,* 424 U.S. at 333. Moreover, under New York law there is a right to judicial review of Commission decisions in the state court system, *see supra* note 6, a circumstance that further supports the rejection of plaintiff's due process claims.[12] *See Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194-95 & n.14 (1985).

In sum, the Court rejects plaintiff's contentions that the landmark laws are unconstitutional on their face as to all churchs, and grants summary judgment for defendants as to those claims.

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[12]There is no need to resolve the merits of plaintiff's contention that the Commission violated its procedural due process rights during the hardship hearing. Those alleged defects could have, and should have, been addressed through an Article 78 proceeding in state supreme court. Moreover, plaintiff has expressly disclaimed any desire to have the matter returned to the landmark commission for a new hearing, which is the only relief that would be appropriate even if the Court were to accept plaintiff's argument that *this hearing,* as opposed to the standard applicable to such proceedings in general, deprived the church of procedural due process. In view of that circumstance, the Court will treat that claim as abandoned. For the same reason, the Court will not decide the merits of whether Article 78 relief can constitute a claim cognizable in a federal court, an issue that has caused some difficulty. *Compare Cooney v. American Horse Shows Ass'n,* 495 F. Supp. 424, 433 n.7 (S.D.N.Y. 1980) *with Herrmann v. Brooklyn Law School,* 432 F. Supp. 236, 239-40 (E.D.N.Y. 1976).

II. *The Trial of this Action*

Although concluding that partial summary judgment should be granted for defendants on plaintiff's claims of facial unconstitutionality, the Court held a trial with respect to plaintiff's claim that the landmark law was unconstitutional as applied. Plaintiff's contentions in that regard are twofold: (1) that because it could no longer carry out its religious mission in its existing facilities the denial of its hardship application constituted a taking of its property without just compensation; and (2) the denial of that application constituted an impermissible burden on the exercise of its religious beliefs.

Initially, the Court was of the view that it could have a trial *de novo* and consider facts not before the landmark commission in deciding whether the landmark laws had been unconstitutionally applied to plaintiff. Subsequently, the Court reconsidered this view and concluded that it would be inappropriate to predicate a finding of unconstitutionality on facts which the landmark commission never had an opportunity to consider, especially since under the statutory scheme, a new application for hardship exemption can be made at any time based upon additional facts.[13] Therefore, the Court, as requested and consented to by the parties,[14] will evaluate this claim solely on the basis

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[13]Indeed, it would hardly be consistent with the principles of comity and federalism that require a federal court to abstain where a remedy may be provided by state law without reaching the constitutional issues, *see Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500-501 (1941), for this Court to deprive the landmark commission of the opportunity conferred upon it by state law to determine whether new facts support plaintiff's hardship application as a matter of state law.

[14]The putative intervenors did not either request or consent to that procedure.

of the record before the landmark commission.[15] However, since the Court is presented with a claim of constitutional

[15]Defendants contend that under *University of Tennessee v. Elliot*, 478 U.S. 788 (1986), the Court must not only confine itself to the administrative record, but must also give preclusive effect to the factual findings of the Commission. *Elliot* requires that when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the courts of that state. *See id.* at 798-99.

However, whether a proceeding is to be regarded as judicial for purposes of *Elliot* preclusion is a question of federal law. Morever, the fact that a proceeding may meet the minimum requirements of due process does not necessarily require that it be afforded preclusive effect. In addition, state law must require that the proceeding be afforded preclusive effect before the federal issue need even be reached.

The Court is unpersuaded that, as a matter of federal law, landmark proceedings should be regarded as quasi-judicial in nature. Indeed, they are more akin to town meetings than judicial proceedings, in that all may be heard regardless of the relevance of their testimony, evidentiary rules do not apply, and questioning by the attorneys for the interested parties is not permitted.

In any event, it does not appear that New York law would require that a decision of the landmark commission be given preclusive effect. Under New York law, a proceeding is quasi-judicial and therefore entitled to preclusive effect if the agency is authorized to act in an adjudicatory fashion, the procedures it employs are sufficient to permit confidence that the facts and issues were fully tested, and the parties reasonably expected to be permanently bound by the result reached. *See Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276-77, 528 N.E.2d 153, 155, 532 N.Y.S.2d 230, 232 (1988), *cert. denied*, 109 S. Ct. 785 (1989). Where, however, an agency makes findings based upon conditions which are subject to change and further review, New York is not likely to give those proceedings preclusive effect. *See id.* An application for a certificate of appropriateness based on hardship appears to be such a proceeding. There is no limit on the number of applications which may be made, and an applicant's economic condition, which is likely to change over time, will affect the likelihood of success of the application. Thus, an application once denied may be pursued again with a different result at a future date.

Moreover, in a case decided by the New York Court of Appeals prior to the *Elliot* decision, that court found that landmark designation

(Footnote continued on following page)

deprivation, it must make a *de novo* review of that evidence.[16]

III. *Plaintiff's Unconstitutional As Applied Claims*

A. *Just Compensation Claims*

Plaintiff's claim of unconstitutionality as applied depends upon plaintiff's ability to prove that it can no longer carry out its religious mission and charitable purpose in its existing facilities because those facilities are inadequate and because it cannot afford to expend the sums necessary to make those facilities adequate. It is that circumstance that underlies plaintiff's contention that the denial of its hardship application deprived it of its property without just compensation in violation of the Fifth Amendment and abridged its right to freely exercise its religious belief in violation of the First Amendment.

At the outset it should be noted that the Supreme Court has never passed upon the constitutionality of a regulation, such as the landmark laws, as applied to the property of a charitable or religious institution. However, in dealing with commercial property, the Supreme Court has recognized that there is no magic formula for determining when a taking has occurred. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). Factors of particu-

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(Footnote continued.)

hearings are not quasi-judicial for purposes of determining what type of Article 78 review they will receive. *See Lutheran Church in America, supra*, 35 N.Y.2d at 128 n.2, 316 N.E.2d at 309 n.2, 359 N.Y.S.2d at 13 n.2. The Court based that holding upon the fact that designation proceedings are not adversary hearings involving cross-examination. *See id.* Certificate of appropriateness hearings share these characteristics.

[16]It is, of course, plaintiff's burden to prove by a preponderance of the evidence that its constitutional rights have been violated on the basis of that record, even though some of the evidence at the hearing may not have been admissible at a federal civil trial.

lar significance, however, are the economic impact of the government action, *i.e.*, its interference with legitimate investment expectations, and the character of the government action, *e.g.*, is the action a physical taking or a land use regulation. *See id.* at 124. These factors must be evaluated in light of the overriding rule that the Fifth Amendment contemplates continued use of a property as it was used in the past, and thus permits no substantial interference with the property owner's primary investment expectations or reasonable beneficial use. *See id.* at 136.

While the concept of legitimate investment expectation is not directly transferable to a charitable or religious institution, the concepts of reasonable beneficial use and the owner's primary expectations are equally applicable to both. Moreover, the New York Courts have developed a takings standard for charitable institutions embodying these concepts that is a constitutionally acceptable standard for determining when there has been a taking of charitable property, *i.e.*, where the landmark designation would prevent or seriously interfere with the carrying out of the charitable purpose of the institution. *See Society for Ethical Culture, supra,* 51 N.Y.2d at 454-55, 415 N.E.2d at 925, 434 N.Y.S.2d at 935; *Lutheran Church in America, supra,* 35 N.Y.2d at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16. Therefore, the Court adopts this test to determine whether plaintiff's Fifth Amendment rights were violated as a consequence of the denial of its hardship application.

B. *Free Exercise Claim*

Assuming *arguendo* that plaintiff's charitable work is the exercise of religion for First Amendment purposes, plaintiff must prove that it can no longer carry out this work in its existing facilities to sustain its free exercise claim. *See Lyng, supra,* 108 S. Ct. at 1326; *Yonkers, supra,* 858 F.2d at 871-72. Thus, in this case, the First Amendment inquiry is

identical in scope to the Fifth Amendment inquiry, since to prevail on either claim plaintiff must prove that it can no longer carry out its religious mission in its existing facilities.

The Court has examined the record before the Commission in an effort to determine if plaintiff has proved by a preponderance of the evidence that it can no longer carry out its charitable purpose in its existing facilities. For the reasons that follow, the Court finds that plaintiff has failed to carry that burden, and that judgment must be entered for the defendant.

C. *Findings of Fact*

Plaintiff contends that the community house is an inadequate structure for carrying out the Church's religious mission and charitable purpose. Plaintiff further alleges that both the community house and the church are in an advanced state of disrepair and cannot be rehabilitated for less than $11 million. Thus, plaintiff argues it can only rehabilitate the Church and carry out its charitable purpose if it is allowed to demolish the community house, build the office tower in its place, and reap the revenues therefrom. Finally, plaintiff contends that its finances are in such a deplorable state that even if the two buildings could be rehabilitated for less than $11 million, it cannot afford to spend more than a minimal sum upon such work. The Court will address each of these contentions in turn.

1. *Adequacy of Community House Space*

Plaintiff's first factual contention concerns the amount of the space contained in the county house, and the configuration of that space in relation to the needs of the church's programs. Plaintiff contends that the evidence shows that: the usable space available in the community house is insufficient to accommodate the variety of activities that com-

pete for the space; that it wishes to expand its existing programs but cannot do so given those space constraints; that it is forced to conduct activities in spaces that are inappropriate for those activities;[17] and that renovation of the interior of the community house is impractical and not feasible.

Plaintiff relies primarily upon an analysis of the use and configuration of the community house space undertaken at plaintiff's request by Walker Associates, an interior design firm. In addition to the testimony of its president, Keith Keppler, *see* 2 App. 462; 15 App. 5275, Walker submitted three reports to the Commission, *see* 10 App. 3429; 14 App. 4843; 16 App. 5586. In those reports and testimony, Walker concluded that the community house is not adequate, suitable or appropriate for the purposes to which it is devoted. *See* 10 App. 3431-32. Walker found that the community house lacked sufficient usable space, that the existing usable space was inefficiently designed and poorly distributed, and that the multiplicity of uses of that space created scheduling conflicts.[18] *See id.*

In addition, Walker concluded that the building's structure was outmoded and inflexible, and that renovation of the structure's interior was impractical and prohibitively expensive due to the massive structural systems within the building, the elevator shafts and support structures, and the impossibility of demolishing thick load bearing walls. *See*

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[17]A focal point of plaintiff's contention in this regard is its claim that it is forced to carry out its feeding program for the homeless from the church mortuary chapel, and thus must carry food from the community house kitchen downstairs and the length of an entire city block to reach the church. In addition, the church contends that it cannot continue to provide shelter for the homeless in the church narthex because that space is inappropriate, and because it can only provide shelter for ten persons per night in that area. *See* 2 App. 380, 382-85.

[18]Specifically, Walker found that the community house contained a net usable area of approximately 38,000 sq. ft., that the Church programs required a usable area of approximately 46,000 sq. ft., leaving a space deficit of approximately 8,000 sq. ft. *See* 2 App. 492.

id. at 3432. In sum, Walker found that the Church could only continue to successfully carry out its charitable and social activities by moving to another more suitable facility, and that the proposed forty-seven story office tower was such a facility. *See* 4 App. 1321-22; 10 App. 3432.

However, the Court, based upon flaws in Walker's methodology and upon conflicting evidence, finds that Walker's conclusions are incorrect, and that plaintiff has failed to prove by a preponderance of the evidence that the community house is unsuitable for its current use.

The credibility and accuracy of Walker's findings are undercut by several factors. First, it is clear that Walker did not attempt to examine the building plans of the community house before it determined that the building could not be easily altered. *See* 3 App. 916. If it had done so, it would have found that in fact the building does not contain massive load bearing walls, but instead is a light steel frame structure that is easily susceptible to alteration.[19] *See* 4 App. 1240; 16 App. 5721-22. Second, Walker based its finding of inadequate usable space upon calculations appropriate to a commercial office building, the area of Walker's expertise, and not upon calculations appropriate to plaintiff's facility. *See* 6 App. 1956; 7 App. 2186. Third, measuring the adequacy of space in an existing building was an unusual task for Walker, which was used to projecting space for designs of proposed buildings.

In addition, Walker conducted its study by asking questions of the heads of each program using the facility, and, unsurprisingly, found that each program head thought he or she needed more space. *See* 14 App. 4853. Moreover, examination of the questionnaires used reveals that they fail to distinguish between program needs and mere desires

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[19]For this reason, and because it was unsupported by any evidence, the Court also rejects Walker's contention that interior renovation of the community house would cost approximately $3.4 million.

for expansion. Furthermore, Walker presented no evidence of objective observations of how the facility is actually used over time. The Court finds therefore that Walker's conclusions are without adequate factual support.

Moreover, other evidence demonstrates that the community house is adequate for the purposes to which it is devoted. Weekly building activity schedules, if anything, supported the conclusion that the community house's space was in fact underutilized, that many of the rooms were not used at all during the day, or were used by very few, and that no scheduling conflicts were apparent. *See* 12 App. 4431-33; 13 App. 4736.[20] In fact, the Church was able to rent out some of its space to area businesses, and has formed a special committee to increase those rentals. *See* 13 App. 4733-34. Moreover, although plaintiff complained that it could accommodate only sixty pupils in its preschool, it has an occupancy permit for one hundred pupils, and therefore underutilizes the capacity of even its preschool facilities. *See* 7 App. 2223; 15 App. 5786.

Walker's conclusion that the community house is inefficiently configured is belied by the fact that it failed to consider inexpensive methods of reconfiguring large rooms, for example, by installing removable room partitions. Finally, the Commission's own calculations reveal that even accepting Walker's estimate of the space needed to conduct current activities, the community house's space deficiency was much lower than Walker's estimate, and that any deficiency could be made up at relatively low cost by utilizing the basement as a storage area. *See* 17 App. 5800.

The credibility of plaintiff's evidence is further undercut by the fact that its proposed new building, which reverses the proportion of space above and below ground in the existing facility, would be only marginally better, if at all, in

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[20]Testimony also indicated that Church membership, and membership in the community club, a primary user of the community house, has been steadily declining. *See* 12 App. 4389-91.

terms of usable space, *see* 3 App. 893-94, and significantly inferior in many other respects such as the quality of the below ground environment, the choked single access point of the office building lobby,[21] and the absence of any plan to encompass the ministry to the homeless in the new structure, which oddly enough is a program that plaintiff asserts it does not have adequate space for in the present structure.[22] *See* 7 App. 2201-10. In sum, plaintiff's reliance upon the Walker report and the Court's rejection of that report supports the conclusion that plaintiff has failed to show by a preponderance of the evidence that the community house is an inadequate structure for conducting its activities.[23]

2. *Required Exterior and Mechanical Repairs*

Plaintiff's second major factual contention is that the community house and the church building both require a complete overhaul and replacement of existing mechanical

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[21]Plaintiff complained that the community house's two entrances, providing access space of 700 sq. ft., are inadequate, but the proposed building has a single access point with an area of 450 sq. ft., and must be shared with the rest of the occupants of the forty-seven story tower. *See* 7 App. 2201.

[22]In addition, plaintiff has failed to show why the existing community house dining facilities, or even the auditorium, could not replace the church mortuary chapel as the site of the breakfast feeding program for the homeless. Both of those facilities are much closer to the kitchen and are never used in the morning.

[23]In fact, the Church did not commission the Walker space study until the Spring of 1985, long after plans for the new building had been drawn. *See* 4 App. 1307. This fact supports the view that the Church's claim that the building is inadequate was an afterthought designed to provide another argument for demolishing the building after its first two attempts to get the proposed construction approved had failed.

This point was aptly made by Commissioner Halsband: "in this case the new building was made in the absence of a program—the program was done last—and that whole intermediate step of comparing what you've got to what you need seems to never to [*sic*] have been expressed. . . ." 6 App. 1936.

systems, and substantial repair and replacement of exterior structural systems at a cost of approximately $11 million. Plaintiff's sole support for this proposition is a study of the mechanical systems and the building exteriors undertaken in 1985 by O'Brien, Krietzburg and Associates ("OKA"), a firm of professional construction managers, submitted through two reports, *see* 10 App. 3281; 14 App. 4951, and the testimony of OKA's president, James O'Brien, *see* 2 App. 413; 4 App. 1205, 1341. In formulating its recommendations, OKA relied upon the report of Edwards & Zuck, P.C., who evaluated the plumbing, mechanical and electrical systems, *see* 10 App. 3367, the report of Caine, Farrell & Bell, architects, who examined the exteriors, *see id.* at 3388, and the report of Barr & Barr, Inc., builders, who provided cost estimates of the repairs. *See id.* at 3396.

Based upon these three reports, OKA concluded that poor maintenance programs in the past have caused the overall exterior physical condition of the buildings to seriously deteriorate, and that the buildings' mechanical systems were outdated and in some cases inoperative. *See id.* at 3286-87. OKA's prescription for these ills involves virtually complete replacement of mechanical, electrical and plumbing systems and significant replacement of exterior elements. *See id.* at 3298-3366. Rehabilitation of existing systems was not considered. The total cost of these repairs and replacements was estimated by OKA to be $11,663,500, on the assumption that construction was to be completed within two years. *See* 14 App. 4956-63.

The Court does not find OKA's assessment persuasive for the following reasons. First, it is clear from the testimony of Ronald Alexander, a former vestryman in charge of the Church's building committee, that OKA was told to maximize the cost of estimates to the greatest defensible extent, and that OKA undertook to do just that by advocating replacement over rehabilitation wherever possible. *See* 3 App. 724. Moreover, OKA admitted a bias in favor of

replacement,[24] and indeed had little experience in rehabilitating older buildings. In addition, OKA did not rely on a full set of plans and specifications in evaluating necessary repairs. *See* 4 App. 1367-68. Instead, OKA relied solely on the reports of other firms who were not called to testify before the commission.

These reasons would be a sufficient basis to reject OKA's conclusions. There is, however, ample additional evidence to show that not only did OKA grossly overestimate the amount of work required, but that its method for allocating costs to that work is seriously flawed. For example, OKA recommended wholesale replacement of the church's front steps and the blue stone steps leading from Park Avenue to the terrace. *See* 10 App. 3312. However, other evidence showed that only the top platform of the church steps and one of the blue stone steps required replacement. *See* 5 App. 1641. Similarly, OKA advocated replacement of all of the sidewalk when only part of the sidewalk was cracked and in need of repair.

In estimating the required roof repairs, OKA ignored the fact that individual tiles could be reused in the repairing the tile roofs, *see* 5 App. 1681-82, and that several of the flat roofs had been recently replaced and thus did not need to be replaced again. *See* 5 App. 1687; 13 App. 4656-57. All of these facts tend to show that the OKA report was not based upon careful examination and consideration of what repairs were truly necessary, but instead upon the presumption that all problems should be solved by complete replacement. *See* 12 App. 4632. Thus, the Court finds OKA's evaluation of necessary exterior repairs incredible and unpersuasive.

Similar flaws are apparent in OKA's evaluation of necessary repairs to the buildings' interior mechanical systems. Since OKA claimed to rely on Edwards & Zuck, it is

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[24]For example, Mr. O'Brien stated that in his view he would "come in and gut the whole thing, because there was nothing worth saving." 4 App. 1349.

especially pertinent to note that OKA in fact departed from the recommendations of that report. For example, while Edwards & Zuck recommended retaining and modifying existing ductwork in the community house, *see* 10 App. 3371, OKA estimated that most of the ductwork had to be replaced. *See id.* at 3349-50.

This selective reliance on Edwards & Zuck supports the inference, absent some other basis for the estimate, that OKA was guessing at what repairs were truly necessary. This inference is supported by other OKA estimates as well. For example, OKA advocated wholesale replacement of the electrical systems, ignoring the fact that much of that work had already been accomplished. *See* 6 App. 2033; 10 App. 3361-62. Indeed, OKA did not even know that there were no outstanding fire code violations, and therefore made recommendations which incorrectly assumed that the auditorium balcony and the church basement had not been brought up to fire code standards. *See* 10 App. 3308-11. Similarly, OKA's sprinkler system estimate ignored areas of the community house that already had sprinkler systems, and included costs for a sprinkler system based upon a square footage estimate for the entire building.

Moreover, OKA's report evidenced a total lack of familiarity with what could be accomplished by retaining and refurbishing existing mechanical systems. Rather than undertaking a detailed analysis of the plumbing, electrical and heating ventilation and air conditioning systems to determine what could be salvaged, OKA simply opted to replace it all. In so doing OKA ignored, for example, the advantages to be gained by retaining the direct current electrical systems, and the virtually unlimited service life of older properly maintained equipment. *See* 16 App. 5749.

In sum, it is clear from OKA's report that their object was not to determine what repairs were truly necessary or required, but to maximize the amount of work and the cost of that work. There is simply no other explanation, and

none has been offered, for OKA's wholesale reliance upon replacement and complete rejection of rehabilitation, especially since there is abundant evidence that many of the systems examined could in fact be rehabilitated.

Quite aside from the defects in OKA's analysis noted above, OKA's method of estimating costs is highly questionable. In estimating costs, OKA relied first upon the cost estimates of Barr & Barr, and second upon its own comparison of the Barr & Barr estimate to those contained in R.S. Means Co., Means Cost Data (1985 ed.), a standard reference work for construction cost estimates. *See* 14 App. 4955. The Means handbook provides cost estimates for a given type of work, *e.g.*, electrical system replacement, on a per square foot of building space basis. *See id.*

While this may be an acceptable method of estimating costs for new construction where there is no existing structure, it is not, as several experts testified, either an appropriate or accurate method of estimating costs in an existing facility because the square foot method fails to account for elements in the existing structure that can be used and adapted to fit in with the rehabilitative work. *See* 3 App. 849, 879, 910, 923; 6 App. 2035. Thus, cost estimates based on a square foot calculation are likely to overstate the actual cost of repair and rehabilitation, or for that matter, replacement.[25]

OKA's estimates are also suspect because they are based not upon first hand examination of the facilities, but upon Barr & Barr's estimates, and Barr & Barr was never called to testify before the Commission to explain their calculations. In addition, the Court finds that OKA overstated its costs by including a 1.67 multiplier for interior work on a landmark when the interior of the community house is not landmarked. *See id.* at 2002. Similarly, OKA included a twelve percent addition for architectural and engineering

[25]One witness testified that OKA's cost estimates were as much as three times too high. *See* 6 App. 2003.

fees that is not only well above the industry average for such fees, *see* 13 App. 4624, but also applied that fee to types of work that do not normally require such expertise. *See* 6 App. 2003.[26]

3. *The Contradictory Evidence*

It should also be noted that substantial evidence contradicting OKA's findings was submitted by the Committee to oppose the Sale of St. Bartholomew's Church ("Committee to Oppose"), see Report of John Altieri, 13 App. 4656; Report of Robert Silman Assoc., P.C., 7 App. 2182, 13 App. 4628, 16 App. 5721; Report of the Ehrenkrantz Group, P.C., 13 App. 4632; Report of James Stewart Polshek and Partners, 13 App. 4620, 16 App. 5709, and by the Commission's own *pro bono* consultants. *See* Report of Polonia Restoration Co., Inc., 16 App. 5731; Report of the Department of General Services of the City of New York ("DGS"), 16 App. 5743. The Court relies on this evidence as well in concluding that OKA's estimates are neither persuasive or credible.

(a) *The Mechanical System*

Mr. Bronson Binger and a team from DGS were clearly the experts most qualified to pass upon the costs of renovating an older building since they make approximately one hundred such estimates every year. *See* 6 App. 2036.

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[26]The Court also finds OKA's insistence on compressing the work into a two year period to be unreasonable. While this recommendation obviously serves to magnify the financial hardship to the Church by requiring large expenditures in a short period of time, it would also require, in all likelihood, severely restricting the use of the facilities to accomplish major repairs. In addition, the recommendation ignores fiscal reality as well. A more reasonable approach, and the one used by other organizations, would be to do the most essential work first, and spread the expenditures out over a longer period of time.

Even more significantly, Mr. Binger personally participated in the renovation of the Church of the Heavenly Rest, a building also designed by Goodhue, and was thus intimately familiar with St. Bartholomew's mechanical systems.[27] *See id.* at 1859-60.

In conducting his assessment, Binger assembled a team which included an electrical engineer, a heating ventilation and air conditioning engineer, a plumbing engineer, and a cost estimator experienced in each of those areas. *See id.* at 1858-59. Binger's team approached the problem by examining each piece of equipment individually, determining what the life expectancy of each piece was and what needed to be replaced, and then pricing out the work for each piece individually. *See id.* at 1863.

Binger's conclusion was that although St. Bartholomew's has deteriorated, it is operable. *See id.* He also concluded that if the existing equipment is refurbished, much of it has an unlimited useful life; that the equipment that has deteriorated can generally be rebuilt for less than the cost of new equipment; and that much of the existing equipment can be made serviceable for relatively small amounts of money over a period of years. *See id.* at 1863-66.

Although Binger acknowledged that his estimate was preliminary, and that older mechanical systems do require knowledgeable maintenance personnel, the Court finds Mr. Binger's estimate to be the most credible and persuasive evidence presented to the Commission.

Binger also concluded that those items that had to be repaired immediately included repairs to the steam meter

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[27]The Church protests that it cannot be expected to perform the miracles that Mr. Binger performed for the Church of the Heavenly Rest. Quite aside from the fact that Mr. Binger's achievements, although impressive, are not miraculous, Mr. Binger volunteered to assist the Church *pro bono* in carrying out the recommended repairs and rehabilitation. *See* 6 App. 2018; 16 App. 5751. Given the Church's claim of financial hardship, it is difficult to understand why it has not accepted this offer.

room, the condenser water system, the D.C. fan motors, the exhaust systems, the Organ, and the heating and plumbing systems at a total cost of $398,000. *See* 16 App. 5747-48. He estimated that further improvements to those and other systems should be undertaken over the next two to ten years at an additional cost of $400,000, and that further elective improvements could be undertaken if finances permitted at a cost of $632,000. *See id.* In all, Binger's estimates that the church and community house mechanical systems could be put into excellent shape for $1,430,000. *See id.*

(b) *The Exterior Work*

Other than the OKA report, the only other evidence of the cost of exterior repairs submitted to the Commission was the report of the Polonia Restoration Co., Inc., a corporation specializing in exterior renovation. *See* 16 App. 5731. Although Polonia's methodology was not detailed in the fashion of Binger's methodology, it appears that Polonia considered repair as an alternative to replacement, and provided cost estimates based on the actual work to be done rather than on a square foot basis. *See* 16 App. 5731-38. The Court concludes, therefore, that Polonia's estimate is the most credible and reasonable assessment of the work required on the exterior of the building.

While Polonia agreed that most of the exterior areas addressed by the OKA report needed attention, Polonia differed as to the extent of the work necessary, whether there should be repair rather than replacement, and differed substantially as to cost. Polonia concluded that it would be appropriate to carry out exterior repairs over five years, and that essential repairs could be accomplished at a cost of $1,141,903 with further optional repairs costing $514,000, for a total cost of 1,655,903. *See id.* at 5734.

Thus, if the Binger estimate for interior work of $1,430,000 is added to Polonia's estimate of $1,655,903

the total cost of renovation for both buildings is approximately $3,085,903 phased in over a period of several years. This estimate is, of course, drastically lower than the OKA estimate. The Church contends, however, that it cannot afford to expend even three million dollars on repairs and replacement.

4. *The Church's Financial Condition*

Plaintiff contends that even if it could put the church and the community house in good working order for $3 million, its financial circumstances do not permit it to expend that amount of money while it continues to run its other programs. The Court rejects this contention as unsupported by the evidence produced before the Commission.

There is little disagreement in the record over the size of the Church's endowment. Although subject to fluctuations in the stock market, the market value of the Church's portfolio stood in excess of $12.5 million at the end of 1985.[28] *See* 16 App. 5487, 5646. Its total funding for 1984 was $14,355,000, including other operating revenues. *See* 2 App. 598. While this sizeable endowment would appear on its face to be capable of supporting a capital expenditure of $3 million, plaintiff contends that much of that endowment cannot be expended under New York law, and the much of

[28]In addition to its endowment assets, the Church owns a twelve room cooperative apartment at 860 Park Avenue which it uses as a residence for its minister, Reverend Thomas Bowers. Although that asset is carried on the books at $104,000, estimates of its market value range much higher. *See* 12 App. 4378.

the rest of the endowment is restricted for specific purposes.[29]

Although this contention may be true in a general sense, plaintiff has failed to recognize that some of the restrictions permit the use of these funds to support of the church building and the community house. These funds could therefore be used for necessary capital expenditures. Moreover, these funds if used for this purpose could free up unrestricted funds that have been designated by the vestry for the same purpose.

One witness before the Commission estimated that as much as $6 million of the endowment could be used for capital expenditure purposes. *See* 6 App. 1971. Of that $6 million, $2.9 million is expendable for specific purposes, and $3.1 million at the discretion of the vestry. *See id.* Plaintiff's own accountants reported that of the Church's $12 million endowment, $2.7 million was expendable for designated purposes, $4.5 million was unrestricted and $4.8 million was restricted as to principal. *See* 13 App. 4569; *see also* 4526-27. Thus, the Court finds plaintiff's claim that because parts of the endowment are restricted it cannot use some of them for capital projects to be incredible and unsupported by the evidence.

The Church also contends that if it takes $3 million out of its endowment, it will be unable to operate its other programs due to loss of income from the endowment.

[29]The endowment is restricted by law in two ways. First, New York law prohibits expenditure of those parts of the endowment restricted by the donor unless the donor consents or the not-for-profit corporation obtains a judicial release. *See* N.Y. Not-for-Profit Corp. Law § 522 (McKinney Supp. 1989). Second, New York law restricts expenditure of those parts of the endowment designated by the donor for specific purposes to expenditure for those purposes. *See id.* New York law leaves the spending of unrestricted funds, such as the net realized gains on an endowment, to the sound discretion of the vestry. *See id.* In addition, some of the endowment has been designated by the vestry for specific purposes. However, the vestry is permitted to redesignate that money at any time.

While it is true that income from the endowment makes up a significant portion of the Church's $3 million annual operating revenue, *see* 15 App. 5392, that claim is unpersuasive for the following reasons.

First, the Church does not have to remove $3 million from the endowment all at once. The endowment could be depleted gradually over a period of years as the work on the church and the community house is performed.[30] Gradual depletion would not only lessen operating revenue lost due to lower dividend and interest income, but would also allow capital appreciation to offset the yearly withdrawals. Second, the Church has, over the last ten years operated at close to a break even level, showing surpluses in some years and losses in others. *See* 2 App. 510; 10 App. 3484-87.[31]

Moreover, it has done so while spending more than $1.6 million on expenses related to the development of the office tower. *See* 13 App. 4655; 16 App. 5637. These facts not only show that the Church is able to make use of large amounts of endowment income for discretionary spending, but also constrain the court to reject plaintiff's contention that it has been forced to make drastic cutbacks in operating expenses because current revenues from endowment income are insufficient to fund the Church's programs.

Finally, the Church has presented no evidence to show what effect withdrawals from the endowment would have on its operating budget. In fact, it did not provide the Com-

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[30]Both the Binger and Polonia estimates sensibly provided that work should be phased in over several years with the most urgently needed repairs taking precedence. This is the normal practice for undertaking major renovation work, primarily for financial reasons. *See* 3 App. 906-07; 16 App. 5747. In addition, the Church never established that it could not borrow a lump sum against its endowment and amortize the loan over an even longer period. *See* 5 App. 1777.

[31]This is true in spite of the fact that the Church budget does not distinguish between operating and capital expenditures, *see* 16 App. 5673, and thus some of the amount reflected as operating expenses may in fact be capital expenditures.

mission with any financial projections that would enable this Court to determine its future financial prospects. This failure is fatal to plaintiff's claim of prospective financial hardship.

Not only has the Church failed to provide such financial projections, it has failed to consider either the possibility of a capital fund raising project or the possible sale of the Church's air rights to a nearby building. Plaintiff's own expert testified that he thought a successful fund raising drive could raise as much as $2 million over a period of years. *See* 2 App. 517-18; 11 App. 3741-42. Although plaintiff vaguely asserts that such a campaign met with failure in 1980, plaintiff has failed to submit any proof to support this contention, and has, as noted above, submitted proof through its own expert supporting a contradictory inference. The Court finds, therefore, that fund raising is at least a reasonable alternative that must be explored before plaintiff's claim of financial hardship can be accepted as credible.[32]

Similarly, plaintiff denies that there is any possibility of selling its air rights to raise revenue.[33] Plaintiff relies primarily on the assertion that it has not had any offers to buy those rights. In fact, interest in purchasing those rights was expressed in a written submission to the Commission. *See* 16 App. 5727. It also appears that interest in the development rights was expressed in the past, but was not pursued by the Church. *See id.* at 5678, 5582-85. Thus, the Court finds that sale of the Church's air rights presents a reasonable method of alternative fund raising that must be

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[32]The reasonableness of this alternative is amply illustrated by the experiences of other churches and synagogues that have conducted successful capital fund raising campaigns. *See* 17 App. 5846-76a.

[33]Air rights refer to the right to develop buildings surrounding the Church property in a way that would intrude upon the air space which is otherwise part of the Church's property interest. The value of those rights has been estimated at over $55 million. *See* 11 App. 4114.

explored before a claim of financial hardship can be supported.[34]

In sum, the Court finds that the Church has failed to show that it cannot afford to pay for the cost of necessary repairs to the church and the community house. It follows that plaintiff has failed to show that its financial situation precludes it from restoring its property and carrying out its religious mission and charitable purpose. Therefore the Court finds, as a matter of fact, that the Church has failed to prove that its community house is inadequate for the purposes to which it is devoted, that the Church has failed to prove that it is incapable of carrying out its charitable purpose within those facilities, and that although those facilities do require some repair and rehabilitation, the Church has failed to show that it cannot afford to pay for those necessary repairs and rehabilitation.

---

[34]Plaintiff also contends that it is not reasonable to expend $3 million on improvement of its property in light of the low market value of the property. The Court rejects this argument. In support of this argument plaintiff submitted the testimony and report of Brown, Harris, Stevens, Inc. *See* 2 App. 525, 4 App. 1247, 11 App. 4059, 15 App. 5287. However, Brown, Harris, Stevens estimated that after necessary repairs the community house would have a market value, as landmarked, of approximately $15 million, and that the church would have a market value, as landmarked, of $20 million, for a total landmarked value of $35 million. *See* 11 App. 4063. The Court finds that $3 million is a wholly reasonable sum for repairs in light of plaintiff's own estimated value of the properties, an estimate which the Committee to Oppose corroborated. *See* 3 App. 826.

CONCLUSION

Since plaintiff has failed to show by a preponderance of the evidence that it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities, plaintiff's First and Fifth Amendment claims must be rejected. The clerk is directed to enter judgment for the defendants and close the above-captioned action.

It is SO ORDERED.

Dated: New York, New York
December 13, 1989

JOHN E. SPRIZZO
United States District Judge

APPENDIX C—Amended Opinion and Order of the United States District Court, Southern District of New York.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE RECTOR, WARDENS, and MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Plaintiff,

against

CITY OF NEW YORK, and LANDMARKS, PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Defendants.

86 Civ. 2848 (JES)

SPRIZZO, D.J.:

The Opinion and Order, dated December 13, 1989, is hereby amended *nunc pro tunc* as follows:

Page 1, after "Of Counsel" for Plaintiff, add the following counsel who appeared on behalf of the Church:

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JAMES G. GLAZEBROOK, ESQ.
Chancellor of St. Bartholomew's Church
1270 Avenue of the Americas
New York, New York 10020

Page 1, after "Cadwalader, Wickersham & Taft, Attorneys . . ." "Amici" should be "Amicus";

Page 1, after "Cadwalader . . . of Plaintiff" add the following "(New York State Interfaith Commission on Landmarking of Religious Property)";

Page 2, after "Stiles . . . of Plaintiff" add "(Roman Catholic Archdiocese of New York)";

Page 2, after "Lane . . . of Plaintiff" add "(Roman Catholic Archdiocese of Brooklyn)";

Page 2, after "Kearney, Esq. . . . Counsel" add:

JEFFREY R. NOTARBARTOLO, ESQ.
Attorney for Amicus Curiae in Support of Plaintiff (Committee of Denominational Executives)
1978 Flatbush Avenue
Brooklyn, New York 11234

Page 2, after "of Defendants" add "(The New York Landmarks Conservancy, National Trust for Historic Preservation, National Center for Preservation Law, Preservation Action, Fine Arts Federation, Preservation League of New York State, and Women's City Club of New York, Inc.)";

Page 2, after "Of Counsel" for Amicus Curiae in Support of Defendants, add the following:

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Page 3, after "Reindel . . . of Defendants" add "(The New York Landmarks Conservancy, National Trust for Historic Preservation, National Center for Preservation Law, Preservation Action, Fine Arts Federation, Preservation League of New York State, and Women's City Club of New York, Inc.)";

Page 8, Footnote 8, Line 3, "Committee to Oppose the Sale of St. Bartholomew's," should read "Committee to Oppose the Sale of St. Bartholomew's ("Committee"),";

Page 12, Footnote 11, Line 4, "the land marked building" should read "the landmarked building";

Page 14, Line 11, "the landmark law was" should read "the landmark laws were";

Page 15, Line 5, "the landmarks commission." should read the Commission.";

Page 15, Footnote 13, Lines 5-6, "the landmark commission" should read "the Commission";

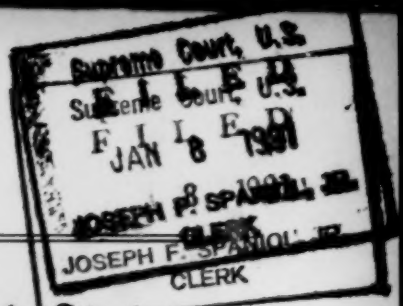
Page 15, Footnote 15, Line 25, "the landmark commission" should read "the Commission";

Page 16, Line 2 "de novo" should read "*de novo*".

It is SO ORDERED.

Dated: New York, New York
January 24, 1990

JOHN E. SPRIZZO
United States District Judge



(2)

No. 90-899

In The

Supreme Court of the United States

October Term, 1990

THE COMMITTEE TO OPPOSE THE SALE OF ST. BARTHOLOMEW'S CHURCH INCORPORATED, J. SINCLAIR ARMSTRONG, ROBERT E. MORRIS, JR., DORIS CAPP STASS, GEORGE H. WEILER, III, MADELEINE CALDER, BEATRICE LOTZ, BROMWELL AULT, JR., NEAL GOLDMAN and CHARLOTTE PIERCE ARMSTRONG,

Petitioners,

against

THE RECTOR, WARDENS and MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH, and THE CITY OF NEW YORK and THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel:

RAYMOND L. VANDENBERG
Chancellor of St. Bartholomew's Church

January 9, 1991

BEST AVAILABLE COPY

Question Presented

Whether the court of appeals erred in holding that the district court's denial of motion to intervene, pursuant to Federal Rule of Civil Procedure 24(b), was not an abuse of discretion where the purported intervenors sought to require a trial *de novo* that the parties had stipulated was unnecessary.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 3

DISCUSSION 3

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Crowell v. Benson, 285 U.S. 22 (1932) 5

Securities and Exchange Commission v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972) 3

The Rector Wardens And Members Of The Vestry Of St. Bartholomew's Church v. The City of New York, 728 F. Supp. 958 (S.D.N.Y.), *aff'd*, 914 F.2d 348 (2d Cir. 1990) 2

Statutes

Federal Rule of Civil Procedure 24 2–3

Other Authorities

Davis, *Administrative Law Treatise* (1984) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90–899

THE COMMITTEE TO OPPOSE THE SALE OF ST. BARTHOLOMEW'S CHURCH INCORPORATED, J. SINCLAIR ARMSTRONG, ROBERT E. MORRIS, JR., DORIS CAPP STASS, GEORGE H. WEILER, III, MADELEINE CALDER, BEATRICE LOTZ, BROMWELL AULT, JR., NEAL GOLDMAN and CHARLOTTE PIERCE ARMSTRONG,

Petitioners,

–against–

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH, AND THE CITY OF NEW YORK and THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted by respondents, The Rector, Wardens and Members of the Vestry of St. Bartholomew's Church ("St. Bartholomew's" or "the Church") in opposition to the certiorari petition of the Committee To Oppose The Sale of St. Bartholomew's Church, Inc. ("the Committee") and certain members of the Committee.[1]

COUNTER STATEMENT OF THE CASE

Petitioners' "case" does not involve questions concerning free exercise of religion, taking of property without compensation, or whether factual determinations in an underlying litigation can only be made on an administrative record without conducting a trial *de novo*.[2] The only issue properly raised in their certiorari petition is the denial of a motion for permissive intervention under F.R.C.P. Rule 24(b).[3]

Contrary to the representations in the petition, petitioners did not — because they are not parties to the litigation and therefore could not — appeal from the district court's decision not to have a trial *de novo*. Neither party appealed that ruling to the court of appeals. Therefore, the court of appeals could not and did not address this issue. The only issue raised

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1. St. Bartholomew's is incorporated under the New York Not For Profit Corporations Law as a Religious Corporation. St. Bartholomew's does not have any parent or subsidiary company.

2. Petitioners sought to intervene in an action entitled *The Rector Wardens And Members Of The Vestry Of St. Bartholomew's Church v. The City of New York And The Landmarks Preservation Commission Of The City Of New York*, 728 F. Supp. 958 (S.D.N.Y.), *aff'd*, 914 F.2d 348 (2d Cir. 1990). The Church filed a petition for a writ of certiorari in that matter, Supreme Court Index No. 90–900, on December 10, 1990.

3. Petitioners also sought to intervene as of right under F.R.C.P. Rule 24(a)(2). The court of appeals held that the district court did not abuse its discretion in denying that motion "because the proposed intervenors lack any legally protectable interest in this matter." (27a). Petitioners do not seek certiorari with respect to that ruling.

by petitioners' appeal to the court of appeals was the denial of their motion to intervene.

REASONS FOR DENYING THE PETITION

Petitioners fail to show any reason why the Court should exercise its discretion to grant their petition for certiorari. Petitioners point to no conflict between the circuits, no unsettled question of federal law, and no error in law as to the denial of their intervention motion — indeed, they point to nothing other than an exercise of discretion by the district court which is amply supported by the record and was correctly affirmed by the court of appeals. There is no showing that the denial of petitioners' intervention motion was wrong, let alone any showing of special and important reasons why their certiorari petition should be granted.

DISCUSSION

In affirming the district court's denial of petitioners' motion for permissive intervention, the court of appeals concluded that not only was there no abuse of discretion in denying the motion, but that:

> It was eminently reasonable to conclude that intervention only would complicate the litigation, and thereby "unduly delay... the adjudication of the rights of the original parties." Fed. R. Civl. P. 24(b). (28a).

The record below is clear that denial of petitioners' motion for permissive intervention was not only a proper act of discretion, but was mandated by any reasonable reading of the Federal Rules of Civil Procedure. Rule 24(b) requires a court in exercising its discretion to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *See, e.g., Securities and Exchange Commission v. Everest Management Corp.*, 475 F.2d 1236, 1239–40 (2d Cir. 1972) (permissive intervention denied where "the complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues").

Petitioners' presence as intervenors would have resulted in substantial delay and prejudice to the existing parties.[4] The parties agreed, and the court below ordered, that this case should be decided on the administrative record before the Landmarks Preservation Commission without the testimony of live witnesses. Petitioners complain that they should have been allowed to intervene as parties in order to require a complex and prolonged trial that plaintiff and defendants had agreed was unnecessary (and that the district court had ruled, as a matter of law, to be inappropriate). It is difficult to imagine anything more prejudicial to the rights of the original parties.

As it was, the litigation before the district court lasted over three and one–half years, much of which was taken up with consideration of petitioners' repeated motions to intervene. During that period, on July 27, 1988, the district court determined as a matter of law that a trial with live witnesses would be inappropriate. (7/27/88 Tr. at 22, 32). On the basis of that ruling, the parties — and the petitioners — briefed the administrative record. The district court ultimately rendered its decision on December 13, 1989, reaffirming its earlier ruling that, based on "principles of comity and federalism," its decision should be made on the administrative record. (12b). That ruling was not appealed by either party.[5]

Indeed, as the district court pointed out, the parties themselves had "requested and consented to" a trial on the administrative record. (12b). The district court denied permissive intervention on the grounds that, *inter alia*, "intervention would have seriously interfered with the parties' desire to

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4. Petitioners are a group of dissident parishioners who, joined by others from outside the Church, have opposed the Church's proposed development. They opposed each of the Church's applications before the Commission and have engaged the Church, its Rector and the members of its Vestry in extensive and costly litigation in state courts.

5. Although the district court declined to conduct a trial *de novo*, the court nonetheless conducted a *de novo* review of the evidence contained in the administrative record before the Landmarks Commission. (12b–14b).

expeditiously resolve the constitutional claims raised on the administrative record, and might well have led to collateralization of the issues and further discovery." (7b). Petitioners have cited no case — and we are aware of none — in which intervention was permitted for the purpose of radically transforming the procedural framework of litigation agreed to by the parties and found by the district court to be legally required.[6]

Finally, while the Church agrees that the Landmarks Law fails to provide anything resembling an orderly procedure for the resolution of factual issues, it was the Church — not petitioners — that was disadvantaged. Both petitioners and the Landmarks Preservation Commission had ample opportunity to submit testimony and reports disputing the evidence submitted on behalf of the Church. The Church, however, was denied any opportunity to rebut adverse submissions by the Commission's staff and the Commission's own witnesses. (A. 407–48, 764–69).[7] Similarly, witnesses appearing on behalf of the Church were subjected to vigorous cross-examination by the members of the Commission, while the testimony of opposing witnesses was, without exception, received uncritically.[8] (*Compare* 4/1295–1336, 1341–94 *with* 3/843–76, 907–27).

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6. Petitioners' rely principally on *Crowell v. Benson*, 285 U.S. 22 (1932), in support of their argument that a trial *de novo* was required. The continuing vitality of *Crowell v. Benson* is uncertain (*See, e.g.*, Davis, *Administrative Law Treatise*, §29:23 (1984)), but it has never been applied to provide a trial *de novo* at the insistance of a party seeking to *uphold* an administrative determination. Moreover, it has nothing to do with denial of intervention — the only issue which petitioners can properly raise.

7. The appendix in the court of appeals is cited as "(A. ___)." The appendix in the district court is cited by volume/page; for example, 10/3271 refers to volume 10, page 3271 of the district court appendix.

8. Given those facts, it was the Church that stood to benefit most from a trial *de novo* before the district court. Nevertheless, having incurred the cost, in time and money, of three separate proceedings before the Landmarks Commission, the Church sought to conserve its diminishing resources by agreeing to a determination by the district court on the basis of the administrative record.

The facts of this case provide no basis for a determination that the denial of intervention by the district court constituted an abuse of discretion or that the court of appeals erred in affirming the district court. On the contrary, they make it clear that the *grant* of petitioners' motion would have been an abuse of discretion.

CONCLUSION

The petition at bar raises no question of either law or policy that warrants certiorari by this Court. What is more, there is no legal basis for intervention. The motion to intervene was properly denied by the district court, and its denial was correctly affirmed. Accordingly, petitioner respectfully prays that the Court deny the petition for a writ of certiorari to review that part of the judgment of the Court of Appeals for the Second Circuit which affirmed the denial of petitioners' motion to intervene.

Dated: January 9, 1991

Respectfully submitted,

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(3)

No. 90-899

Supreme Court, U.S.
FILED
FEB 1 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE COMMITTEE TO OPPOSE THE SALE OF ST. BARTHOLOMEW'S CHURCH INCORPORATED, J. SINCLAIR ARMSTRONG, ROBERT E. MORRIS, JR., DORIS CAPP STASS, GEORGE H. WEILER, III, MADELEINE CALDER, BEATRICE LOTZ, BROMWELL AULT, JR., NEAL GOLDMAN and CHARLOTTE PIERCE ARMSTRONG,

Petitioners,

against

THE RECTOR, WARDEN AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH, AND THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for Second Circuit

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February 1, 1991

This reply brief is submitted by petitioners, The Committee To Oppose The Sale Of St. Bartholomew's Church Inc. ("the Committee") and certain members of St. Bartholomew's Church ("the Church"), in support of their certiorari petition.

The respondent Church incorrectly argues at page 2 of its brief that petitioners cannot raise the issue of the failure of the District Court to conduct a trial de novo because they did not appeal that ruling. The record facts demonstrate that petitioners contested that ruling in their motion to intervene, the denial of which was appealed.

On July 10, 1987, in open court, the Church and the City advised the District Court that the parties were prepared to try the case based solely upon the non-judicial record before the Landmarks Preservation Commission.

The proposed intervenors immediately protested the procedure because the Church's case before the Landmarks Preservation Commission was not subjected to cross-examination, the Federal Rules of Evidence or discovery and was not contested by a formal adversary (A 309-310).[1] In response to petitioners' objections, the District Court permitted them to renew their motion to intervene. (A 313) The Court permitted the renewed motion because it was concerned that the proposed intervenors (who had continuously attacked the credibility of the Church's case) were not being adequately represented by the defendants who were prepared to stipulate to a trial on a record which had not been judicially tested. (District Court Transcript of November 20, 1987, pages 27-28).

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[1] References to (A ____) are to pages in the Appendix at the Court of Appeals, Second Circuit.

The renewed motion to intervene was filed on October 30, 1987. (A 313) It specifically urged that the resolution of the constitutional issues required a judicial trial and that intervention should be granted to assure such a trial. (A 313-317)

On November 20, 1987, the District Court stated (at page 19 of the transcript):

> I have already decided that you are not adequately represented. I have already decided that the information you have to give me would be useful to me in resolving the issues left open by my denial of the motion for summary judgment. The only two issues which I haven't decided ... are the issue of whether (a) intervention is appropriate as a matter of right and (b) whether, if intervention as of right is not appropriate, I can entertain a permissive intervention as a matter of discretion without an independent jurisdictional predicate.

The issue of intervention, however, became mooted when, at oral argument held on

December 29, 1987, the Court stated "I plan a trial" (District Court Transcript of December 29, 1987, p. 72, 79), at which the proposed intervenors were to be permitted to participate as amicus curiae.

Accordingly, since the District Court planned to conduct a trial, the motion to intervene was denied. (A 323) Petitioners, to preserve their rights, filed a notice of appeal (A 324), which appeal was subsequently withdrawn, by order of the Second Circuit, without prejudice to renewal at the end of the case.[2]

As a result of the District Court's decision to conduct a trial, the parties, in

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[2] After judgment was rendered against the plaintiff Church, it appealed. Petitioners also appealed the denial of intervention urging that in the event of a reversal, intervention should be granted and the case remanded for a full trial.

cluding petitioners, as amicus curiae, were directed to prepare a pre-trial order. During the course of preparations for trial, and in open court on June 27, 1988, the Court indicated a possible reversal of its earlier position, stating: "A consent trial based upon the administrative record may be what is required". (Transcript of June 27, 1988, p.45).

One month later, on July 27, 1988, the District Court ruled: "I will try the case based upon the administrative record." (Transcript of July 27, 1988, p. 35)

On the subject of a trial de novo, petitioners objections and their motion to intervene, the District Court's opinion states that the parties requested that the trial be conducted solely on the basis of the adminis-

trative record and that "[t]he putative intervenors did not either request or consent to that prccedure" (12b); and that "[i]nitially, the Court was of the view that it could have a trial de novo . . . in deciding whether the landmark laws had been unconstitutionally applied to plaintiff." (12b) The Court continued:

> "Subsequently, the Court reconsidered this view and concluded that it would be inappropriate to predict a finding of unconstitutionality on facts which the Landmark Commission never had opportunity to consider . . . " (12b).

In so ruling, the Court, as requested by the parties and notwithstanding the objections of the petitioners, ruled that it would decide the Church's constitutional claims solely on the basis of the non-judicial administrative record. (12b - 13b).

When the Church appealed the judgment

against it, the proposed intervenors reinstated their appeal from the denial of their motion to intervene, requesting that, in the event of a reversal, their motion to intervene should be granted and the case remanded for a full trial.

In the District Court and in their appeal to the Second Circuit, petitioners fully raised the issue of the propriety of the District Court's ruling that it was required to try the case upon the administrative record and that a trial de novo was not required.

In incorrectly ruling that it was legally compelled to try the case on the basis of the administrative record, the District Court abdicated its responsibility as a Federal Court to exercise its independent judgment upon a judicial record. (See Point I of peti-

tion for certiorari.) The petitioners appealed that decision through the only mechanism available to them, their motion to intervene.

Having ruled that it could not hold a trial de novo, the District Court, in its decision, stated that permissive intervention was denied as a matter of discretion because "intervention would have seriously interfered with the parties' desire to expeditiously resolve the constitutional claims raised on the administrative record." (7 b). The Second Circuit affirmed that holding.

In the Second Circuit, petitioners urged that if "the judgment below is not affirmed, intervention should be permitted and the case should be remanded for a full trial

at which the Church's fact and expert witnesses should be subjected to cross-examination and the proof presented should be subjected to the rules of evidence and where defendants and the intervenors should be permitted to conduct discovery to contest the credibility of the Church's proof." (Pages 5-6 of Appellant's Brief in Second Circuit, Appeal No. 88-775; See also pages 12-15 of said brief and page 10 of Appellant's Reply brief wherein they stated that "intervenors have sought a judicial determination of the constitutional issues raised by the Church based upon a complete judicial record in which the truth would emerge.")

Since the Second Circuit affirmed the District Court's judgment against the Church, the petitioners motion to intervene as well as

their appeal from the denial of intervention was mooted.

Notwithstanding the mooting of petitioners appeal by reason of the affirmance of the judgment against the Church, the Second Circuit ruled that the District Court did not abuse its discretion by denying permissive intervention because it was eminently reasonable for the District Court to conclude "that intervention only would complicate the litigation, and thereby 'unduly delay . . . the adjudication of the rights of the original parties.' Fed. R. Civ. P. 24(b)." (28a).

As argued in the petition for a writ of certiorari, the District Court was required to exercise its independent judgment upon a judicial record to adjudicate the constitutional, as applied, claims of the Church. The

District Court was correct in its initial ruling that it should hold such a trial, notwithstanding the parties desire to expeditiously resolve the controversy based upon the non-judicial administrative record. The District Court thereafter erred when it held that it was legally precluded from conducting a trial de novo and denied intervention to petitioners who urged such a trial. The Second Circuit was wrong in affirming that decision.

In sum, the petitioners, in the District Court, raised the issue of the necessity for a trial de novo to resolve the constitutional issues, sought to intervene to compel such a trial, initially convinced the District Court that a trial de novo must be held, and, when the District Court reversed itself, petitioners perfected the appeal to the Second Circuit of the denial of their motion to intervene to compel a full trial.

Accordingly, the respondent Church's argument that the petitioners did not raise the issue of the failure of the District Court to conduct a trial de novo is totally without merit.

CONCLUSION

For the reasons stated herein and in the petition for certiorari it is respectfully requested that, in the event this Court grants the petition for certiorari of the Church, this petition should also be granted.

Respectfully submitted,

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Dated: New York, New York
February 1, 1991